SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 467.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

WILLIAM E. ROGERS ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	a	a
Transcript of record from the District Court of the United States for the District of New Mexico	1	1
Citation and service	1	1
Writ of error and clerk's return	2	2
Petition in condemnation	4	4
Defendants who own or claim some interest in certain lands described in petition	8	8
Charles A. Bigelow	8	8
Nathan V. Cook	8	8
E. C. Cook	9	9
Don F. Lyman	9	10
Henry A. Bock	12	12
Herbert E. Steadman	13	14
C. Bert Smith	15	15
William E. Rogers	17	17
Margie L. Highsmith	19	19
Arthur A. Kaiser	19	19
V. B. Short and H. L. Wilson	21	21
Benjamin F. Pearman	23	23
Herbert Litton	24	24
S. F. Miles	26	26
George N. Upham	26	26
Bryan Banta	27	27
John Fidell	27	27
John Carothers and Benjamin D. Conklin and Mrs. Anna C. Bentley	29	29
Mary Fidell	33	33
Annie B. McHenry	34	34
John H. Hayhurst and William L. Rogers	35	35

	Original.	Print.
Defendants who own or claim some interest in certain lands described in petition—Continued.		
R. W. Rankin	36	36
Henry Zajic	39	39
John W. Sanner and W. B. Clark	39	39
E. H. Vance	41	41
Curtis V. Yoh	43	43
C. E. Vaughn	44	44
J. J. Alexander	45	45
Clare E. Courtney	46	46
Mary Z. McCrillis	49	49
Frank Edwards	49	49
I. C. Roberts	50	50
J. C. Detling	51	51
G. H. Scripps	52	52
E. F. Hardwick and J. C. Minga	53	53
Mrs. Marshall K. Holt	55	55
Order, July 27, 1917, directing plaintiff to deposit with clerk of the district court the sum of $6 557.06 for the use and benefit of certain defendants, etc	57	56
Defendants for whose use and benefit the amounts are to be deposited with clerk of district court	57	57
William E. Rogers	57	57
V. B. Short and H. L. Wilson	59	59
S. F. Miles	61	61
George N. Upham	62	62
Bryan Banta et al	62	62
Henry Zajic	63	63
Curtis V. Yoh	64	64
Mary Z. McCrillis	65	65
J. G. Detling	66	66
G. H. Schripps	66	66
Motion for supplemental order, requiring plaintiff to deposit with the clerk of the district court a sum equal to 6% interest on the principal sum of $6,557.06, from April 19, 1912, until the date of deposit of such principal sum, etc	69	69
Supplemental order, October 1, 1917, requiring plaintiff to deposit with the clerk of the district court a sum equal to 6% interest on the principal sum of $6,557.06, from April 19, 1912, until the date of deposit of such principal sum, etc	70	70
Petition for writ of error	71	71
Assignment of errors	72	72
Order allowing writ of error	73	73
Præcipe for transcript	73	73
Clerk's certificate to transcript	74	74
Appearances	75	75
Order of submission	77	76
Opinion, Hook, J	78	76
Judgment	82	79
Petition for writ of error	82	80
Assignments of errors	83	80
Order allowing writ of error	85	82
Writ of error	87	82
Citation and service	89	83
Clerk's certificate	90	84

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December term, 1918, of said court, before the Honorable William C. Hook, circuit judge, and the Honorable Jacob Trieber, district judge.

Attest:

[SEAL.] E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit, on the twenty-fifth day of May, A. D. 1918, a transcript of record pursuant to a writ of error directed to the District Court of the United States for the District of New Mexico, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein The United States of America was plaintiff in error and William E. Rogers et al. were defendants in error, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, is in the words and figures following, to wit:

1 (Citation and Service thereon.)

United States of America,
Eighth Judicial Circuit—ss.

In the District Court of the United States for the Eighth Circuit.

The United States of America: To William E. Rogers, V. B. Short, H. L. Wilson, S. F. Miles, George N. Upham, Bryan Banta, J. C. Mings (Minga) Henry Zajic, Curtis V. Yoh, Mary Z. McCrillis, J. G. Detling, and G. H. Scripps—Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the District of New Mexico, sitting at Santa Fe, wherein The United States of America is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Seal
U. S. Dist. Court,
Dist. of New Mex.
1912

Witness, The Honorable Colin Neblett, Judge of the district court of the United States for the district of New Mexico, at Santa Fe, in said district, this 20th day of March, A. D. 1918.

COLIN NEBLETT, Judge.

I hereby acknowledge service of attached citation and praecipe, as to defendants in error W. E. Rogers, V. B. Short, Geo. N. Upham, J. G. Detling, and G. H. Scripps, this 1st day of April, 1918.

J. M. HERVEY.

I hereby acknowledge service of attached citation and praecipe, as to defendants in error H. L. Wilson, Bryan Banta, and J. C. Mings, this 4th day of Apr 1918.

J. H. JACKSON.

I hereby acknowledge service of attached citation and praecipe, this 6 day of April 1918.

HENRY ZAJIC,
WENSLO ZAJIC,
owner of the land.

Memorandum of Clerk:

Here follows an official envelope bearing the corner card of the United States Marshal for the District of New Mexico, Santa Fe, N. M., addressed to "Mary Z. McCrillis, Grand Junction, Colo." and also the following postmarks, etc: "Santa Fe, N. Mex. Mar. 30, 2:30 P. M. Unknown. Name not in Directory. Return to Writer, Unclaimed from Grand Junction, Colo. Grand Junction, Colo. April 6, 1918, 7 P. M. Opened by U. S. Marshal."

Said envelope contains a letter of P. W. Dent, District Counsel, U. S. Reclamation Service, Address El Paso, Texas, addressed to Mary Z. McCrillis, Grand Junction, Colo., with copy of citation and designation, requesting that acknowledgment thereof be made in order to save cost and delay of service by U. S. Marshal.

---

2 (Writ of Error and Clerk's Return.)

United States of America—ss.

The President of the United States of America: To the Honorable, the Judge of the District Court of the United States, for the District of New Mexico—Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you at the October Term, 1917, thereof, between The United States of America and William E. Rogers, V. B. Short, H. L. Wilson, S. F. Miles, George N. Upham, Bryan Banta, J. C. Mings (Minga) Henry Zajic, Curtis V. Yoh, Mary Z. McCrillis, J. G. Detling, and G. H. Scripps a manifest error hath happened, to the great damage of the said, The United States of America, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be

therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals, for the eight circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals, for the eighth circuit, on or before the 27th day of May, 1918, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 29th day of March, in the year of our Lord, one thousand nine hundred and eighteen, and of the Independence of the United States, the 142nd year. Issued, at office in the city and county of Santa Fe, in said district, with the seal of the district court of the United States for the district of New Mexico, and dated as aforesaid.

Seal
U. S. Dist. Court,
Dist. of New Mex.
1912

WYLY PARSONS,
Clerk United States District Court,
District of New Mexico.

Allowed by:
Colin Neblett, Judge.

Return.

The United States of America,
District of New Mexico—ss.

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of the District Court of the United States for the district of New Mexico, at the city and county of Santa Fe, in said district, this 22nd day of May, 1918.

WYLY PARSONS, Clerk.
By .....
Deputy Clerk.

District of New Mexico—ss.

The plaintiff in error, having served this writ, by lodging a copy thereof in the clerk's office where the record remains, and having given the security required by law, on the issuing of the citation, within the time required by law, this writ therefore becomes a supersedeas.

In witness whereof, I hereunto subscribe my name, and affix the seal of the District Court of the United States for the district of New Mexico, at the city and county of Santa Fe, in said district, this 2nd day of May, A. D. 1918.

Seal
U. S. Dist. Court,
Dist. of New Mex.
1912

WYLY PARSONS, Clerk.

---

3 (Petition in Condemnation, filed January 18, 1915.)

In the District Court of the United States for the District of New Mexico.

United States of America, Plaintiff,
No. 361. vs. Law.

Charles A. Bigelow; Nathan V. Cook; V. B. Short, whose full first name is to plaintiff unknown; Benjamin F. Pearman; E. C. Cook, whose full first name is to plaintiff unknown; S. F. Miles, whose full first name is to plaintiff unknown; Herbert Litton; George N. Upham; Bryan Banta; John Fidell; John Carothers and Benjamin D. Conkling; Mary Fidell; Annie D. McHenry; John H. Hayhurst; Don F. Lyman; R. W. Rankin, whose full first name is to plaintiff unknown; Henry A. Bock; Henry Zajic; John W. Sanner; E. H. Vance, whose full first name is to plaintiff unknown; Curtis V. Yoh; C. E. Vaughn, whose full first name is to plaintiff unknown; Herbert E. Steadman; J. J. Alexander, whose full first name is to plaintiff unknown; Clara E. Courtney; C. Bert Smith; William E. Rogers; Mary Z. McCrillis; Frank Edwards; I. C. Roberts, whose full first name is to plaintiff unknown; J. G. Detling, whose full first name is to plaintiff unknown; Margie L. High-

smith; G. H. Scripps, whose full first name is to plaintiff unknown; E. F. Hardwick, whose full first name is to plaintiff unknown; Mrs. Marshall K. Holt; Arthur A. Kaiser; W. B. Clark, whose full first name is to plaintiff unknown; Anna C. Bentley; William L. Rogers; H. L. Wilson, whose full first name is to plaintiff unknown; and J. C. Mings, whose full first name is to plaintiff unknown.

Plaintiff, United States of America, for cause of action against above named defendants, states:

1. That each and all of the defendants herein are residents of the State of New Mexico except the following:

That defendant V. B. Short is a non-resident of the State of New Mexico and resides at 315 Rock St., Little Rock, Ark.; that defendant S. F. Miles is a non-resident of the State of New Mexico and resides at Harrisonville, Mo.; that defendant George N. Upham is a non-resident of the State of New Mexico and resides at Coffeyville, Kans.; that defendant Bryan Banta is a non-resident of the State of New Mexico and resides at Stratford, Okla.; that defendant John Fidell is a non-resident of the State of New Mexico and resides at Chicopee, Kans.; that defendant Anna C. Bentley is a non-resident of the State of New Mexico and resides at Stirling, Kans.; that defendant Annie D. McHenry is a non-resident of the
4 State of New Mexico and resides at 301 Lafayette St., St. Joseph, Mo.; that defendant William L. Rogers is a non-resident of the State of New Mexico and resides at Pilot Point, Texas; that defendant R. W. Rankin is a non-resident of the State of New Mexico and resides at Stronghurst, Ia.; that defendant Henry Zajic is a non-resident of the State of New Mexico and resides at Hollywood, Kans.; that defendant John W. Sanner is a non-resident of the State of New Mexico and resides at Decatur, Ill.; that defendant W. B. Clark is a non-resident of the State of New Mexico and resides at El Paso, Texas.; that defendant E. H. Vance is a non-resident of the State of New Mexico and resides at Zybach, Texas; that defendant C. E. Vaughn is a non-resident of the State of New Mexico and resides at Guide Rock, Nebr.; that defendant S. J. Alexander is a non-resident of the State of New Mexico and resides at Laddonia, Mo.; that defendant Clara E. Courtney is a non-resident of the State of New Mexico and resides at Canon City, Colo.; that defendant Mary Z. McCrillis is a non-resident of the State of New Mexico and resides at Grand Junction, Colo.; that defendant I. C. Roberts is a non-resident of the State of New Mexico and resides at Lenexa, Kans.;

that defendant J. D. Detling is a non-resident of the State of New Mexico and resides at Ansonia, Ohio; that defendant G. H. Scripps is a non-resident of the State of New Mexico and resides at Rushville, Ill.; that defendant Mrs. Marshall K. Holt is a non-resident of the State of New Mexico and resides at Los Angeles, Cal.; that defendant J. C. Mings is a non-resident of the State of New Mexico and resides at Galesburg, Ill.; that defendant H. L. Wilson is a non-resident of the State of New Mexico and resides at Albaugh, Cal.

That defendants Benjamin F. Pearman, Herbert Litton, John Carothers, Benjamin D. Conkling, Mary Fidell, John H. Mayhurst, Curtis V. Yoh, Frank Edwards, and each of them, are non-residents of the State of New Mexico, and the whereabouts and places of residence of said defendants, and each of them, are unknown to plaintiff.

2. That under and pursuant to the Act of Congress approved June 17, 1902, which said Act appears in Volume 32 of the Statutes at Large of the United States, at page 388, and is hereby referred to, and the various acts of Congress supplemental thereto and amendatory thereof, which are hereby referred to, the Secretary of the Interior heretofore, to-wit, on or about Dec. 18, 1905, caused to be purchased of the Pecos Irrigation Co. an irrigation system known as the Carlsbad project, located in the County of Eddy and State of New Mexico, consisting of reservoirs, dams, controlling gates, canals and other necessary appurtenant works, said project being designed for the storage, diversion and development of the waters of the Pecos River and its tributaries; that since the purchase as aforesaid the said Carlsbad project has been maintained and operated by the United States for the benefit of the water users under said system; that from examinations, surveys and investigations theretofore made and caused to be made by him, the said Secretary of the Interior prior to August 25, 1911, determined that additional water storage facilities for said project were necessary, practicable and advisable, and ascertained that there is sufficient additional arid land in said County and State tributary to said irrigation project which may be supplied with the additional water stored by said additional works at a cost which will render the additional works feasible and return to the reclamation fund the cost of said works, and on to-wit, August 25, 1911, did determine to proceed with the work of constructing said additional works as a part of the said general system of irrigation and did find satisfactory all of the other conditions of said project as regards the feasibility thereof.

3. That the irrigation project heretofore mentioned comprehends and includes what is commonly known as the McMillan Dam and Reservoir and the Avalon Dam and Reservoir and the impounding therein of the waters of the Pecos River and its tributaries for the purpose of irrigating about 25,000 acres of land in said County of Eddy and State of New Mexico.

3½. That on to-wit, Sept. 19, 1911, the Secretary of the Interior of the United States caused to be commenced the construction of said additional works determined upon as aforesaid by him as necessary and feasible for the purposes aforesaid, and the same were completed on or about the 19th day of April, 1912;

3¾. That for the purpose of carrying out the provisions of said Acts of Congress of June 17, 1902, and the other Acts of Congress amendatory thereof and supplementary thereto, hereinbefore referred to, and in order to provide for the storage of additional waters to be impounded by said additional works, and for other necessary purposes connected with said project, it became necessary, and the Secretary of the Interior determined that it was necessary, to acquire certain lands and real estate of the said defendants situate in the County of Eddy and State of New Mexico, and at the date of the completion of said additional works, to-wit, April 19th, 1912, the said lands of said defendants hereinafter described were flooded and thereby appropriated by the Government of the United States under authority of the said Acts of Congress aforesaid for said necessary purposes, but no compensation therefor has been up to this time paid for the said lands so appropriated as aforesaid by the Secretary of the Interior.

4. That there is now available in the Reclamation fund of the United States the necessary funds to pay any and all damages that may be awarded to said defendants, and each of them, on account of the taking and appropriation by plaintiff of the lands and real estate hereinafter described as hereinbefore set forth.

5. That on Dec. 19, 1914, the Secretary of the Interior of the United States, under the said Act of Congress of June 17, 1902, requested the Attorney General of the United States to cause proceedings to be commenced for the condemnation of said lands and real estate hereinafter described for the purposes aforesaid and so appropriated by the United States on the said April 19, 1912; and thereupon, on the 22nd
6 day of December, 1914, the Attorney General of the United States instructed the United States Attorney

for the District of New Mexico to commence such condemnation proceedings for the said purpose, and this proceeding is instituted under the instructions from the Attorney General of the United States.

6. That all of the tracts of land and real estate hereinafter particularly described lie within the following described sections of land in Eddy County, N. M., to-wit: Sections numbers twenty-five (25) and thirty-six (36) in Township eighteen (18) south of Range twenty-six (26) east of the New Mexico Principal Meridian; Sections numbers one (1), two (2), twelve (12), thirteen (13), fourteen (14), twenty-three (23), twenty-four (24), twenty-six (26), twenty-seven (27) and thirty-four (34) in Township nineteen (19) south of Range twenty-six (26) east of the N. M. P. M.; Sections numbers one (1), two (2) and three (3) in Township (20) south of Range twenty-six (26) east; Sections numbers twenty-nine (29), thirty (30), thirty-one (31) and thirty-two (32) in Township eighteen (18) south of Range twenty-seven (27) east; Sections numbers six (6), seven (7) and eighteen (18) in Township nineteen (19) south of Range twenty-seven (27) east.

7. That defendant Charles A. Bigelow is the owner of the following described tract of land, to-wit:

The east one-half of the southeast quarter, (SE¼) of the southwest quarter (SW¼) of Section thirty-four (34), Township nineteen (19) south of Range twenty-six (26) east of the New Mexico Principal Meridian, containing twenty (20) acres.

That plaintiff has attempted to purchase said tract last above described but has been unable to do so as plaintiff and said defendant cannot agree upon the proper compensation to be paid therefore.

8. That defendant Nathan V. Cook is the owner of the following described tract of land, to-wit:

A tract of land in the northeast quarter (NE¼) of the southwest quarter (SW¼) of Section thirty-four (34), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the northwest corner of the southwest quarter (SW¼) of the southeast quarter (SE¼) of Section thirty-four (34), Township nineteen (19) south of Range twenty-six (26) East, N. M. P. M.; thence north eighty-nine degrees (89) and fifty-four (54) minutes west four hundred ninety-seven and four-tenths (497.4) feet to initial point in flow line of McMillan Reservoir at elevation thirty-two hundred seventy-

two and six-tenths (3272.6) feet above mean sea level marked by pipe number one (1); thence north four (4) degrees and thirty-seven (37) minutes west four hundred seventeen and two-tenths (417.2) feet to pipe number two (2); thence north nine (9) degrees and fifty-eight (58) minutes east five hundred eighty-three and three-tenths (583.3) feet to pipe number three (3); thence north fifty-three (53) degrees and forty (40) minutes east five hundred forty-four and eight-tenths (544.8) feet to pipe number four (4), it being also the center of the above mentioned section; thence south twenty-four (24) minutes west thirteen hundred fourteen and six-tenths
7 (1314.6) feet to the northwest corner of the southwest quarter (SW¼) of the southeast quarter (SE¼) of said section, being the point of beginning. Containing twelve and seventy-five hundredths (12.75) acres.

That plaintiff has attempted to purchase said tract last above described but has been unable to do so as plaintiff and defendant cannot agree upon the proper compensation to be paid therefor.

9. That defendant E. C. Cook is the owner of the following described two tracts of land:

A tract of land in the southwest quarter (SW¼) of the southeast quarter (SE¼) of Section twenty-seven (27) Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southeast corner of the southwest quarter (SW¼) of the southeast quarter (SE¼) of Section twenty-seven (27), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence north twenty-four (24) minutes east two hundred seven and two-tenths (207.2) feet along subdivision line to point in flow line of McMillan Reservoir at elevation thirty-two hundred seventy-two and six-tenths (3272.6) feet above mean sea level marked by pipe number eight (8); thence south thirty-nine (39) degrees and three (3) minutes west two hundred sixty-six and five tenths (266.5) feet to point on Section line marked by pipe number seven (7); thence south eighty-nine (89) degrees fifty-four (54) minutes east one hundred sixty-six and eight-tenths (166.8) feet on section line to point of beginning as above described. Containing forty-hundredths (.40) acres.

A tract of land in the northwest quarter (NW¼) of the northeast quarter (NE¼) of Section thirty-four (34) Township nineteen (19) south of Range twenty-six (26) East, New Mexico Principal Meridian, described as follows:

Beginning at the northeast corner of the northwest quarter (NW¼) of the northest quarter (NE¼) of Section thirty-four (34), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south twenty-four (24) minutes west twelve hundred sixty-two and four-tenths (1262.4) feet along subdivision line to pipe number nineteen (19); thence south thirteen (13) degrees and thirty-three (33) minutes west fifty-one and seven-tenths (51.7) feet to pipe number eighteen (18); thence north eighty-nine (89) degrees and fifty-four (54) minutes west seven hundred ninety-five and nine-tenths (795.9) feet along subdivision line to pipe number six (6); thence north twenty-six (26) degrees and thirteen (13) minutes east fourteen hundred sixty-two and seven-tenths (1462.7) feet to pipe number seven (7); thence south eighty-nine (89) degrees and fifty-four (54) minutes east one hundred sixty-six and eight-tenths (166.8) feet on section line to point of beginning as above described. Containing fourteen and forty-five hundredths (14.45) acres.

That the plaintiff has attempted to purchase said two tracts last above described but has been unable to do so as plaintiff and defendant cannot agree upon the proper compensation to be paid therefor.

10. That defendant Don F. Lyman is the owner of the following described three tracts of land, to-wit:

8 A tract of land in the northwest quarter (NW¼) of the northeast quarter (NE¼) of Section twenty-three (23) Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southeast corner of the northwest quarter (NW¼) of the northeast quarter (NE¼) of Section twenty-three (23), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south eighty-nine (89) degrees and forty (40) minutes west three hundred ninety-four (394) feet on subdivision line to pipe number thirty-four (34); thence north eight (8) degrees and thirty-seven (37) minutes east six hundred forty-four and nine-tenths (644.9) feet to pipe number thirty-five (35); thence north seventy-eight (78) degrees and fifty-nine (59) minutes east three hundred four and one-tenth (304.1) feet to pipe number thirty-six (36); thence south six hundred ninety-four and one-tenth (694.1) feet on subdivision line to the point beginning as above described. Containing five and twenty-two hundredths (5.22) acres.

A tract of land in the northeast quarter (NE¼) of the northeast quarter (NE¼) of Section twenty-three (23), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southwest corner of the northeast quarter (NE¼) of the northeast quarter (NE¼) of Section twenty-three (23), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence north six hundred ninety-four and one-tenth (694.1) feet on subdivision line to pipe number thirty-six (36); thence north seventy-five (75) degrees east two hundred seventy-four and two-tenths (274.2) feet to pipe number thirty-seven (37); thence north twenty-seven (27) degrees and forty-four (44) minutes east six hundred forty-one and two-tenths (641.2) feet to pipe number thirty-eight (38); thence north eighty-nine (89) degrees and twenty-nine (29) minutes east seven hundred sixty-five and eight-tenths (765.8) feet on section line between sections fourteen (14) and twenty-three (23) in township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., to the northeast corner of said Section twenty-three (23); thence south on section line between sections twenty-three (23) and twenty-four (24) in Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., thirteen hundred and thirty-one and ninetenths (1331.9) feet to the southeast corner of northeast quarter (NE¼) of the northeast quarter (NE¼) of said Section twenty-three (23); thence south eighty-nine (89) degrees and forty (40) minutes west thirteen hundred twenty-eight and one-tenth (1328.1) feet on subdivision line to the point of beginning as above described. Containing thirty-four and forty-hundredths (34.40) acres.

A tract of land in the southeast quarter (SE¼) of the southeast quarter (SE¼) of Section fourteen (14), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southeast corner of Section fourteen (14), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south eighty-nine (89) degrees and twenty-nine (29) minutes west seven hundred sixty-five and eight-tenths (765.8) feet on section line
9 between Sections fourteen (14) and twenty-three (23) in township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., to pipe number thirty-eight; thence north twenty-two (22) degrees and fifty-nine (59) minutes east, four hundred (400) feet to pipe number thirty-nine

(39); thence south seventy-one (71) degrees and forty-seven (47) minutes east six hundred and thirty-nine and four-tenths (639.4) feet to point on section line between Sections thirteen (13) and fourteen (14) in Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., marked by pipe number forty (40); thence south fourteen (14) minutes east one hundred sixty-two and four-tenths (162.4) feet on section line between Sections thirteen (13) and fourteen (14) in Township nineteen (19) south, Range twenty-six (26) east, N. M. P. M., to the point of beginning as above described. Containing four and thirty-six hundredths (4.36) acres.

That the plaintiff has attempted to purchase said three tracts last above described but has been unable to do so as plaintiff and defendant cannot agree upon the proper compensation to be paid therefor.

11. That the defendant Henry A. Bock is the owner of the following described three tracts of land, to-wit:

A tract of land in the southwest quarter (SW¼) of the southeast quarter (SE¼) of Section thirteen (13) Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the south one-quarter (¼) corner of Section thirteen (13), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence north eighty-nine (89) degrees and fifty-nine (59) minutes east four hundred sixteen (416) feet on section line between Sections thirteen (13) and twenty-four (24) in Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., to pipe number sixty (60); thence north five (5) degrees and twenty-one (21) minutes west twelve hundred twenty-three (1223) feet; thence north fifty-five (55) degrees and thirty-four (34) minutes east one hundred ninety-two and nine-tenths (192.9) feet to pipe number sixty-two (62); thence south eighty-nine (89) degrees and fifty-nine (59) minutes west four hundred seventy and two-tenths (470.2) feet on subdivision line to the northwest corner of the southwest quarter (SW¼) of the southeast quarter (SE¼) of said Section thirteen (13); thence south fourteen (14) minutes east thirteen hundred twenty-nine and two-tenths (1329.2) feet on subdivision line to the point of beginning as above described. Containing nine and forty-seven hundredths acres (9.47).

A tract of land in the northwest quarter (NW¼) of the southeast quarter (SE¼) of Section thirteen (13), Town-

ship nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southwest corner of the northwest quarter (NW¼) of the southeast quarter (SE¼) of Section (13) of Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence north eighty-nine (89) degrees and fifty-nine (59) minutes east four hundred seventy and two-tenths (470.2) feet on subdivision line to pipe number sixty-two (62); thence north fifty-five (55) degrees and thirty-four (34) minutes east five hundred seven and one-tenth (507.1) feet; thence north twenty-three (23) degrees and seven (7) minutes east five hundred (500) feet; thence north sixty-four (64) degrees and fifty-two (52) minutes east two hundred fifty-four and six-tenths (254.6) feet to pipe number sixty-five (65); thence north fourteen (14) minutes west four hundred seventy-four and nine-tenths (474.9) feet on subdivision line to the northeast corner of the northwest quarter (NW¼) of the southeast quarter (SE¼) of said section; thence south eighty-nine (89) degrees and fifty-nine (59) minutes west thirteen hundred eighteen and four-tenths (1318.4) feet on subdivision line to the center of said section; thence south fourteen (14) minutes east thirteen hundred twenty-nine and two-tenths (1329.2) feet on subdivision line to the point of beginning as above described. Containing thirty and ninety-hundredths (30.90) acres.

A tract of land in the northeast quarter (NE¼) of the southeast quarter (SE¼) of Section thirteen (13) Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the northwest corner of the northeast quarter (NE¼) of the southeast quarter (SE¼) of Section thirteen (13), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south fourteen (14) minutes east on subdivision line four hundred seventy-four and nine-tenths (474.9) feet on subdivision line to pipe number sixty-five; thence north sixty-four (64) degrees and fifty-two (52) minutes east nine hundred forty-five and four-tenths (945.4) feet; thence north thirty-three (33) degrees and forty-eight (48) minutes east eighty-six and nine-tenths (86.9) feet to pipe number sixty-seven (67); thence south eighty-nine (89) degrees and fifty-nine (59) minutes west nine hundred two and four-tenths (902.4) feet on subdivision line to the point of beginning as above described. Containing four and forty-four hundredths (4.44) acres.

That plaintiff has attempted to purchase said three tracts of land last above described but has been unable to do so as plaintiff and defendant cannot agree upon the proper compensation to be paid therefor.

12. That said defendant Herbert E. Steadman is the owner of the following described three tracts of land, to-wit:

A tract of land in the southeast quarter (SE¼) of the southeast quarter (SE¼) of Section twelve (12), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the northeast corner of the southeast quarter (SE¼) of the southeast quarter (SE¼) of Section twelve (12) Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south twenty-four (24) minutes east two hundred thirty-six and three-tenths (236.3) feet on section line between Section seven (7), Township nineteen (19) south of Range twenty-seven (27) east, N. M. P. M., and Section twelve (12), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., to point marked by pipe number sixty-two (62); thence north fifty-eight (58) degrees and fifty-seven (57) minutes west four hundred fifty-eight and four-tenths (458.4) feet to pipe number sixty-three (63); thence south eighty-nine (89) degrees and fifty-
11 six (56) minutes east three hundred ninety-one (391) feet on subdivision line to point of beginning as above described. Containing one and six-hundredths (1.06) acres.

A tract of land in the northeast quarter (NE¼) of the southeast quarter (SE¼) of Section twelve (12), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southeast corner of the northeast quarter (NE¼) of the southeast quarter (SE¼) of Section twelve (12), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence north eighty-nine (89) degrees and fifty-six (56) minutes west nine hundred forty-nine (949) feet on subdivision line to pipe number sixty-four (64); thence north fourteen (14) degrees and fifty (50) minutes west five hundred fifteen (515 feet to pipe number sixty-five (65); thence south eighty-nine (89) degrees and twenty-seven (27) minutes west two hundred forty-six and one-tenth (246-1) feet to pipe number sixty-six (66); thence north thirty-four (34) minutes west eight hundred thirty-five (835) feet to the northwest corner of the northeast quarter (NE¼) of the southeast quarter (SE¼) of said section; thence south

eighty-nine (89) degrees and fifty-two (52) minutes east thirteen hundred twenty-six and two-tenths (1326.2) feet on subdivision line to east one-quarter (¼) corner of said section; thence south twenty-four (24) minutes east thirteen hundred twenty-six and five-tenths (1326.5) feet on section line between Section seven (7), Township nineteen (19) south of Range twenty-seven (27) east, N. M. P. M. and Section twelve (12), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., to the point of beginning as above described. Containing thirty-six and forty-five hundredths (36.45) acres.

A tract of land in the northwest quarter (NW¼) of the southeast quarter (SE¼) of Section twelve (12) Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the northeast corner of the northwest quarter (NW¼) of the southeast quarter (SE¼) of Section twelve (12), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south thirty-four (34) minutes east eight hundred thirty-five (835) feet on subdivision line to pipe number sixty-six (66); thence north sixty-eight (68) degrees and fifty-one (51) minutes west two hundred seventy-eight and two-tenths (278.2) feet to pipe number sixty-seven (67); thence north nine (9) degrees and twelve (12) minutes west seven hundred forty-three and two-tenths (743.2) feet to pipe number seventy (70); thence south eighty-nine (89) degrees and fifty-two (52) minutes east three hundred seventy and three-tenths (370.3) feet on subdivision line to the point of beginning as above described; containing five and sixty-hundredths (5.60) acres.

That plaintiff has attempted to purchase said three tracts last above described but has been unable to do so as plaintiff and defendant cannot agree upon the proper compensation to be paid therefor.

13. That said defendant C. Bert Smith is the owner of the following described three tracts of land, to-wit:

A tract of land in the southwest quarter (SW¼) of the southwest quarter (SW¼) of Section six (6), Town-
12 ship (19) south of Range twenty-seven (27) east, New Mexico Principal Meridian, described as follows:

Beginning at the southwest corner of Section six (6), Township nineteen (19) south of Range twenty-seven (27) east, N. M. P. M.; thence east one hundred forty (140) feet

on section line between Sections six (6) and seven (7), Township nineteen (19) south of Range twenty-seven (27) east, N. M. P. M.; to pipe number eighty-eight (88); thence north eighteen (18) degrees and thirty (30) minutes west four hundred fifty-four (454) feet to pipe number eighty-nine (89); thence south twenty-four (24) minutes east four hundred twenty-nine (429) feet on section line between Section one (1), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., and Section six (6), Township nineteen (19) south of Range twenty-seven (27) east, N. M. P. M., to the point of beginning as above described. Containing twenty-five hundredths (.25) acres.

A tract of land in the southeast quarter (SE¼) of the southeast (SE¼) of Section one (1), Township nineteen (19) south of Range twenty-six (26) east, New Mexico, Principal Meridian, described as follows:

Beginning at the southeast corner of Section (1), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence north twenty-four (24) minutes west four hundred twenty-nine (429) feet on section line between Section six (6), Township nineteen (19) south of Range twenty-seven (27) east, N. M. P. M., and Section one (1), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., to pipe number eighty-nine (89); thence north eighteen (18) degrees and thirty (30) minutes west two hundred two (202) feet; thence north fifteen (15) degrees and thirty-eight (38) minutes west seven hundred thirty-three and three-tenths (733.3) feet to pipe number ninety-one (91); thence north eighty-nine (89) degrees and forty-four minutes (44) west ten hundred seventy-eight and three-tenths (1078.3) feet on subdivision line to the northwest corner of the southeast quarter (SE¼) of the southeast quarter (SE¼) of said Section one (1); thence south twenty (20) minutes east thirteen hundred twenty-five and six-tenths (1325.6) feet to the southwest corner of the southeast quarter (SE¼) of the southeast quarter (SE¼) of said Section one (1); thence south eighty-nine (89) degrees and forty (40) minutes east, thirteen hundred thirty-four and six-tenths (1334.6) feet on section line between Sections one (1) and twelve (12), Township nineteen (19) south, Range twenty-six (26) east, N. M. P. M., to the point of beginning as above described, containing thirty-six and sixteen-hundredths (36.16) acres.

A tract of land in the northeast quarter (NE¼) of the southeast (SE¼) of Section one (1), Township nineteen (19)

south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southwest corner of the northeast quarter ($NE\frac{1}{4}$) of the southeast quarter ($SE\frac{1}{4}$) of Section one (1), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south eighty-nine (89) degrees and forty-four (44) minutes east ten hundred seventy-eight and three-tenths (1078.3) feet on subdivision line to pipe number ninety-one (91); thence north fifteen (15) degrees and
13 thirty-eight (38) minutes west six hundred sixty-six and seven-tenths (666.7) feet; thence north twenty-nine (29) degrees and forty-three (43) minutes east seven hundred eighty-six and eight-tenths (786.8) feet to pipe number ninety-three (93); thence north eighty-nine (89) degrees and forty-eight (48) minutes west twelve hundred ninety-six and five-tenths (1296.5) feet on subdivision line to the northwest corner of the northeast quarter ($NE\frac{1}{4}$) of the southeast quarter ($SE\frac{1}{4}$) of said Section one (1); thence south twenty (20) minutes east thirteen hundred twenty-five and six-tenths (1325.6) feet on subdivision line to the point of beginning as above described. Containing twenty-nine and sixteen-hundredths (29.16) acres.

That plaintiff has attempted to purchase said three tracts last above described but has been unable to do so as plaintiff and defendant cannot agree upon the proper compensation to be paid therefor.

14. That said defendant William E. Rogers is the owner of the following described three tracts of land, to-wit:

A tract of land in the northwest quarter ($NW\frac{1}{4}$) of the southwest quarter ($SW\frac{1}{4}$) of Section one (1), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the west one-quarter ($\frac{1}{4}$) corner of Section one (1), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south eighty-nine (89) and forty-eight (48) minutes east thirteen hundred thirty-one and eight-tenths (1331.8) feet on subdivision line to the northeast corner of the northwest quarter ($NW\frac{1}{4}$) of the southwest quarter ($SW\frac{1}{4}$) of said section; thence south fifteen (15) minutes east eight hundred fifty-six and one-tenth (856.1) feet on subdivision line to pipe number ninety-one (91); thence south sixty-four (64) degrees and thirty-two (32) min-

utes west sixty-five and three-tenths (65.3) feet to pipe number ninety-two (92); thence south seventy-two (72) degrees and twenty-two (22) minutes west seven hundred sixty-four and six-tenths (764.6) feet to pipe number ninety-three (93); thence north twelve (12) degrees and twenty-five (25) minutes west nine hundred thirty-two (932) feet to pipe number ninety-four (94); thence north fifty-eight (58) degrees and sixteen (16) minutes west four hundred six and six-tenths (406.6) feet to the point of beginning as above described. Containing twenty-one and sixteen-hundredths (21.16) acres.

A tract of land in the southwest quarter (SW¼) of the northwest quarter (NW¼) of Section one (1), Township nineteen (19) south of Range twenty-six east (26) New Mexico Principal Meridian, described as follows:

Beginning at the west one-quarter (¼) corner of Section one (1), Township nineteen (19) south of Range twenty-six (26) west, N. M. P. M.; thence north twelve (12) minutes west six hundred twenty and six-tenths (620.6) feet on section line between Sections one (1) and two (2), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., to pipe number ninety-eight; thence north fifty-four (54) degrees and thirty-four (34) minutes east twelve hundred eight and five-tenths (1208.5) feet to pipe number ninety-nine (99); thence south eighty-nine (89) degrees and fifty-four (54) minutes east three hundred forty-three and seven-tenths (343.7) feet on subdivision line to the northeast corner
14 of the southwest quarter (SW¼) of the northwest quarter (NW¼) of said Section one (1); thence north eighty-nine (89) degrees and forty-eight (48) minutes west thirteen hundred thirty-one and eight-tenths (1331.8) feet on subdivision line to the point of beginning as above described. Containing thirty-two and five-hundredths (320.5) acres.

A tract of land in the northwest quarter (NW¼) of the northwest quarter (NW¼ of Section one (1), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southeast corner of the northwest quarter (NW¼) of the northwest quarter (NW¼) of Section one (1); thence south fifteen (15) minutes east thirteen hundred twenty-three and two-tenths (1323.2) feet on subdivision line to the southeast corner of the southwest quarter (SW¼) of the northwest quarter (NW¼) of said section one (1), Township nineteen (19) south, Range twenty-six (26) east, N. M. P. M.; thence north eighty-nine (89) degrees and fifty-four (54)

minutes west three hundred forty-three and seven-tenths (343.7) feet on subdivision line to pipe number ninety-nine (99); thence north fifty-nine (59) degrees and thirty-one (31) minutes east three hundred ninety-eight and one-tenth (398.1) feet to pipe number one hundred (100); thence south fifteen (15) minutes east two hundred three and six-tenths (203.6) feet on subdivision line to the point of beginning as above described. Containing eighty-hundredths (.80) acres.

That plaintiff has attempted to purchase said three tracts last above described but has been unable to do so as plaintiff and defendant cannot agree upon the proper compensation therefor.

15. That defendant Margie L. Highsmith is the owner of the following described tract of land, to-wit:

The east half ($E\frac{1}{2}$) of the northeast quarter ($NE\frac{1}{4}$) of Section one (1), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, and north half ($N\frac{1}{2}$) of the northwest quarter ($NW\frac{1}{4}$) of Section six (6), Township nineteen (19) south of Range twenty-seven (27) east, N. M. P. M.; and south half ($S\frac{1}{2}$) of southwest quarter ($SW\frac{1}{4}$); the northwest quarter ($NW\frac{1}{4}$) of the southwest quarter ($SW\frac{1}{4}$) and the southwest quarter ($SW\frac{1}{4}$) of the northwest quarter ($NW\frac{1}{4}$) of Section thirty-one (31), Township eighteen (18) south of Range twenty-seven (27) east, New Mexico Principal Meridian, containing three hundred fourteen and ninety-two hundredths (314.92) acres.

That plaintiff has attempted to purchase said tract last above described but has been unable to do so as plaintiff and defendant cannot agree upon the proper compensation to be paid therefor.

16. That said defendant Arthur A. Kaiser is the owner of the following described three tracts of land, to-wit:

The west half ($W\frac{1}{2}$) of the southwest quarter ($SW\frac{1}{4}$) of Section twenty-nine (29), Township eighteen (18) south of Range twenty-seven (27) east, New Mexico Principal Meridian.

15 A tract of land in the northwest ($NW\frac{1}{4}$) of the northwest quarter ($NW\frac{1}{4}$) of Section thirty-two (32), Township eighteen (18) south Range twenty-seven (27) east, New Mexico Principal Meridian, described as follows:

Beginning at the northwest corner of Section thirty-two (32), Township eighteen (18) south of Range twenty-seven (27) east, N. M. P. M.; thence north eighty-eight (88) degrees degrees and twenty-one (21) minutes east, thirteen hundred seventeen and seven-tenths (1317.7) feet on section line between Sections twenty-nine (29) and thirty-two (32), Township eighteen (18) south of Range twenty-seven (27) east, N. M. P. M., to the northeast corner of the northwest quarter (NW¼) of the northwest quarter (NW¼) of said Section thirty-two (32); thence south thirty-seven (37) minutes west thirteen hundred thirty and two-tenths (1330.2) feet to the southeast corner of the northwest quarter (NW¼) of the northwest quarter (NW¼) of said section, on subdivision line; thence south eighty-eight (88) degrees and forty-five (45) minutes west eleven hundred forty-one and two-tenths (1141.2) feet on subdivision line to pipe number one hundred forty-five (145); thence north forty-seven (47) degrees and fifty-five (55) minutes eighty-seven and eight-tenths (87.8) feet; thence north thirty-three (33) degrees and fifty (50) minutes west one hundred ninety-four feet (194) to pipe number one hundred forty-two (142); thence north thirty-three (33) minutes east eleven hundred (1100) feet on section line between Sections thirty-one (31) and thirty-two (32), Township eighteen (18) south, Range twenty-seven (27) east, N. M. P. M., to the point of beginning as above described. Containing thirty-nine and fifty-seven hundredths (39.57) acres.

A tract of land in the southwest quarter (SW¼) of the northwest quarter (NW¼) of Section twenty-nine (29), Township eighteen (18) south of Range twenty-seven (27) east, New Mexico Principal Meridian, described as follows:

Beginning at the west one-quarter (¼) corner of Section twenty-nine (29), Township eighteen (18) south of Range twenty-seven (27) east, N. M. P. M.; thence north eighty-eight (88) degrees and forty-six (46) minutes east thirteen hundred eighteen and eight-tenths (1318.8) feet on subdivision line to the southeast corner of the southwest quarter (SW¼) of the northwest quarter (NW¼) of said section; thence north four (4) minutes east six hundred sixty-one and seven-tenths (661.7) feet on subdivision line to pipe number twenty-two (22); thence north eighty-two (82) degrees and fifty-three (53) minutes west six hundred two and four-tenths (602.4) feet to pipe number twenty-three (23); thence south fifty-seven (57) degrees and sixteen (16) minutes west three hundred sixty-three and eight-tenths (363.8) feet to pipe number twenty-four (24); thence south two (2) degrees and fifteen

(15) minutes west two hundred sixty-four (264) feet to pipe number twenty-five (25); thence south eighty-four (84) degrees and one (1) minute west four hundred eight and two-tenths (408.2) feet to pipe number twenty-six (26); thence south two hundred sixty-one (261) feet on section line between Sections twenty-nine (29) and thirty (30) in Township eighteen (18) south of Range twenty-seven (27) east, N. M. P. M., to the point of beginning as above described. Containing sixteen and forty-six hundredths (16.46) acres.

That plaintiff has attempted to purchase said three tracts of land last above described but has been unable to do as plaintiff and defendant cannot agree upon the proper compensation to be paid therefor.

17. That said defendants V. B. Short and H. L. Wilson are the owners of or claim some interest in the following described three tracts of land, to-wit:

A tract of land in the southwest quarter (SW¼) of the southeast quarter (SE¼) of Section thirty-four (34), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the south one-quarter (¼) corner of Section thirty-four (34), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south eighty-nine (89) degrees and fifty-four (54) minutes east thirteen hundred twenty-five (1325) feet to the southwest corner of the southeast quarter SE¼) of the southeast quarter (SE¼) of said section; thence north twenty-four minutes (24) east one hundred fifty-six and nine-tenths (156.9) feet to intersection with the west embankment of Lake McMillan; thence north thirty-five (35) degrees and two (2) minutes west twelve hundred sixty-eight and four-tenths (1268.4) feet along center line of said embankment; thence north forty-six (46) degrees and thirty-four (34) minutes east one hundred eighty-two and five-tenths (182.5) feet to intersection with subdivision line marked by pipe number thirteen (13); thence north eighty-nine degrees (89) and fifty-four (54) minutes west seven hundred ten (710) feet to the northwest corner of the southwest quarter (SW¼) of the southeast quarter (SE¼) of said section; thence south twenty-four (24) minutes east thirteen hundred fourteen and six-tenths (1314.6) feet to point of beginning as above described. Containing twenty-seven and forty-nine hundredths (27.49) acres.

A tract of land in the northwest quarter (NW¼) of the southeast quarter (SE¼) of Section thirty-four (34), Town-

ship nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southwest corner of the northwest quarter (NW¼) of the southeast quarter (SE¼) of Section thirty-four (34), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south eighty-nine (89) degrees and fifty-four (54) minutes east seven hundred ten (710) feet along subdivision line to pipe number thirteen (13); thence north forty-six (46) degrees and thirty-four (34) minutes east five hundred seventeen and five-tenths (517.5) feet along flow line of McMillan Reservoir at elevation thirty-two hundred sixty-five and six tenths (3265.6) feet above mean sea level; thence north seventeen (17) degrees and forty-six minutes (46) east eight hundred (800) feet; thence north three (3) degrees and forty-two (42) minutes west one hundred ninety-seven and three-tenths feet (197.3) to point in subdivision line marked by pipe number sixteen (16); thence north eighty-nine (89) degrees and fifty-four (54) minutes west thirteen hundred eight (1308) feet along subdivision line to the center of said section; thence south twenty-four (24) minutes west thirteen hundred fourteen and six-tenths (1314.6) feet to point of beginning as above described. Containing thirty-two and sixty-four hundredths (32.64) acres.

A tract of land in the southwest quarter (SW¼) of the northeast quarter (NE¼) of Section thirty-four (34), Township nineteen (19) south of Range twenty-six (26) east,
17 New Mexico Principal Meridian, described as follows:

Beginning at the center of Section thirty-four (34), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south eighty-nine (89) degrees and fifty-four (54) minutes east thirteen hundred eight (1308) feet along subdivision line to a point in the flow line of McMillan Reservoir at elevation thirty-two hundred sixty-five and six-tenths (3265.6) feet above mean sea level marked by pipe number sixteen (16); thence north three (3) degrees and forty-two minutes (42) west ten hundred two and seven-tenths (1002.7) feet; thence north thirteen (13) degrees and thirty-three (33) minutes east three hundred fourteen and four-tenths (314.4) to point in subdivision line marked by pipe number eighteen (18); thence north eighty-nine (89) degrees and fifty-four (54) minutes west seven hundred ninety-five and nine-tenths (795.9) feet along subdivision line to point in flow line of McMillan Reservoir at elevation thirty-two hundred seventy-two and six-tenths (3272.6) feet above mean sea level marked by pipe number six (6); thence south

thirty-three (33) degrees and thirty-five (35) minutes west nine hundred forty-four and three-tenths (944.3) feet to point in subdivision line marked by pipe number five (5); thence south twenty-four (24) minutes west five hundred twenty-four and five-tenths (524.5) feet to point of beginning as above described. Containing thirty-two and fifteen-hundredths (32.15) acres.

18. That said defendant Benjamin F. Pearman is the owner of the following described two tracts of land, to-wit:

A tract of land in the northeast quarter (NE¼) of the northeast quarter (NE¼) of Section thirty-four (34), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southwest corner of the southeast quarter (NE¼) of Section thirty-four (34), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south twenty-four minutes (24) west twelve hundred sixty-two and four-tenths (1262.4) feet to point in flow line of McMillen Reservoir at elevation thirty-two hundred sixty-five and six-tenths (3265.6) feet above mean sea level marked by pipe number nineteen (19); thence north thirteen (13) degrees and thirty-three (33) minutes east five hundred thirty-three and nine-tenths (533.9) feet; thence north sixteen (16) degrees and forty (40) minutes east seven hundred (700) feet; thence north fifty-five (55) degrees east one hundred twenty-five (125) feet to point in subdivision line marked by pipe number twenty-two (22); thence north eighty-nine (89) degrees and fifty-four (54) minutes west four hundred twenty (420) feet to point of beginning as above described. Containing three and three-tenths (3.3) acres.

A tract of land in the southeast quarter (SE¼) of the southeast quarter (SE¼) of Section twenty-seven (27), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southwest corner of the southeast quarter (SE¼) of the southeast quarter (SE¼) of Section twenty-seven (27), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south eighty-nine de-
18 grees (89) and fifty-four (54) minutes east four hundred twenty (420) feet to point in flow line of McMillan Reservoir at elevation thirty-two hundred sixty-five and six-tenths (3265.6) feet above mean sea level marked by pipe number twenty-two (22); thence north fifty-five (55) degrees east ten hundred seventy-five (1075) feet; thence north

eighteen (18) degrees and twenty-six (26) minutes east ninety-five and two-tenths (95.2) feet to point in subdivision line marked by pipe number twenty-four (24); thence north twenty-eight (28) minutes east six hundred fifteen and four-tenths (615.4) feet to the northeast corner of the southeast quarter (SE¼) of the southeast quarter (SE¼) of said section; thence north eighty-nine (89) degrees and fifty-five minutes (55) west ten hundred thirty-eight and nine-tenths (1038.9) feet along subdivision line to a point in flow line of McMillan Reservoir at elevation thirty-two hundred seventy-two and six-tenths (3272.6) feet above mean sea level marked by pipe number eleven (11); thence south sixteen (16) degrees and ten (10) minutes east two hundred nine and five-tenths (209.5) feet to pipe number ten (10); thence south eleven (11) degrees and fifty-seven (57) minutes west six hundred fifty-four and four-tenths (654.4) feet to pipe number nine (9); thence south thirty-nine (39) degrees and three (3) minutes west three hundred forty-eight and two-tenths (348.2) feet to point in subdivision line marked by pipe number eight (8); thence south twenty-four (24) minutes west two hundred seven and two-tenths (207.2) feet to point of beginning as above described. Containing twenty-five and forty-nine hundredths (25.49) acres.

19. That said defendant Herbert Litton is the owner of the following described four tracts of land, to-wit:

A tract of land in the southwest quarter (SW¼) of the southwest quarter (SW¼) of Section twenty-six (26), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the northwest corner of the southwest quarter (SW¼) of the southwest quarter (SW¼) of Section twenty-six (26), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south twenty-eight (28) minutes west six hundred fifteen and four-tenths (615.4) feet along section line to pipe number twenty-four (24); thence north eighteen (18) degrees and twenty-six (26) minutes east six hundred four and eight-tenths (604.8) feet; thence north twenty degrees (20) and twenty (20) minutes west forty-three (43) and two-tenths (.2) feet to pipe number twenty-six (26); thence north eighty-nine (89) degrees and fifty-five (55) minutes west one hundred seventy-one and five-tenths (171.5) feet to point of beginning, as above described. Containing six-tenths (.6) acres.

A tract of land in the northwest quarter of the southwest quarter (SW¼) of Section twenty-six (26), Township nine-

teen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southwest corner of the northwest quarter (NW¼) of the southwest quarter (SW¼) of Section twenty-six (26), Township nineteen (19) south of Range twenty-six east, N. M. P. M.; thence north twenty-eight (28) minutes east four hundred fifty-two and seven-tenths (452.7) feet on section line to pipe number twenty-seven (27); thence south twenty (20) degrees and twenty (20) minutes east four
19 hundred eighty-three (483) feet to pipe number twenty-six (26); thence north eighty-nine (89) degrees and fifty-five (55) minutes west one hundred seventy-one and five-tenths (171.5) feet on section line to point of beginning, as above described. Containing thirty-three hundredths (.33) acres.

A tract of land in the northwest quarter (NW¼) of the southwest quarter (SW¼) of Section twenty-six (26), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the west one-quarter (¼) corner of Section twenty-six (26), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south twenty-eight (28) minutes west four hundred ninety-five (495) feet on section line to pipe number twenty-nine (29); thence north forty (40) degrees and fifty-two (52) minutes east four hundred fifty (450) feet; thence north thirty-one (31) degrees forty-eight (48) minutes east one hundred eighty-one and two-tenths (181.2) feet to pipe number thirty-one (31); thence north eighty-nine (89) degrees and fifty-seven (57) minutes west three hundred eighty-six (386) feet along subdivision line to point of beginning as above described. Containing one and thirty-seven hundredths (1.37) acres.

A tract of land in the northwest quarter (NW¼) of the southwest quarter (SW¼) of Section twenty-six (26), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the northeast corner of the northwest quarter (NW¼) of the southwest quarter (SW¼) of Section twenty-six (26), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south twenty-eight (28) minutes west one hundred thirty-five and one-tenth (135.1) feet on subdivision line to pipe number thirty-four (34); thence north sixty-two degrees (62) and thirteen (13) minutes west two hundred ninety and six-tenths (290.6) feet to pipe number

thirty-three (33); thence south eighty-nine (89) degrees and fifty-five (55) minutes east two hundred fifty-eight and seven-tenths (258.7) feet on subdivision line to the point of beginning as above described. Containing eleven hundredths (.11) acres.

20. That said defendant S. F. Miles is the owner of the following described tract of land, to-wit:

A tract of land in the northeast quarter of the southeast quarter (NE¼ of SE¼) of Section twenty-seven (27 Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southeast corner of the northeast quarter (NE¼) of the southeast quarter (SE¼) of Section twenty-seven (27), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence north twenty-eight (28) minutes east four hundred fifty-two and seven-tenths (452.7) feet along Section line to pipe number twenty-seven (27); thence north twenty (20) degrees and twenty (20) minutes west two hundred seventy-three and eight-tenths (273.8) feet; thence north forty (40) degrees and fifty-two (52) min-
20 utes east one hundred fifty (150) feet to pipe number twenty-nine (29); thence north twenty-eight minutes (28) east four hundred ninety-five (495) feet along section line to the east one-quarter (¼) corner of said section twenty-seven (27); thence north eighty-nine (89) degrees and fifty-seven minutes (57) west three hundred thirty-five (335) feet along subdivision line to pipe number twelve (12); thence south twenty-eight (28) degrees and thirty-one (31) minutes west fourteen hundred ninety-eight and three-tenths (1498.3) feet to pipe number eleven (11); thence south eighty-nine (89) degrees and fifty-five (55) minutes east ten hundred thirty-eight and nine-tenths (1038.9) feet to point of beginning as above described. Containing nineteen and seventy-five hundredths (1975) acres.

21. That said defendant George N. Upham is the owner of the following described tract of land:

A tract of land in the south twelve (12) acres of the southeast quarter (SE¼) of the northeast quarter (NE¼) of Section twenty-seven (27), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the east one-quarter (¼) corner of Section twenty-seven (27), Township nineteen (19) south of Range

twenty-six (26) east, N. M. P. M.; thence north eighty-nine (89) degrees and fifty-seven (57) minutes west three hundred thirty-five (335) feet on subdivision line to pipe number twelve (12); thence north twelve (12) degrees and twenty-nine (29) minutes west four hundred five and three-tenths (405.3) feet to pipe number thirteen (13); thence south eighty-nine (89) degrees and fifty-six (56) minutes east four hundred twenty-two and six-tenths (422.6) feet on property line; thence south twenty-eight (28) minutes west three hundred ninety-five and seven-tenths (395.7) feet on section line to the point of beginning as above described. Containing three and forty-four hundredths (3.44) acres.

22. That the said defendant Bryan Banta is the owner of the following described tract of land:

A tract of land in the north twenty-eight (28) acres of the southeast quarter (SE¼) of the northeast quarter (NE¼) of Section twenty-seven (27), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at a point on section line between Sections twenty-six (26) and twenty-seven (27) in Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., which bears north twenty-eight (28) minutes east and three hundred ninety-five and seven-tenths (395.7) feet distant from the east one-quarter (¼) corner of Section twenty-seven (27), Township nineteen (19) south of Range twenty-six (26) east, marked by a stone; thence north eighty-nine (89) degrees and fifty-six (56) minutes west four hundred twenty-two and six-tenths (422.6) feet on property line to pipe number thirteen (13); thence north twenty-nine (29) degrees east three hundred sixty-four and three-tenths (364.3) feet to pipe number fourteen (14); thence north sixty-eight (68) degrees and thirty-one (31) minutes east two hundred seventy-one and eight-tenths (271.8) feet to point on section line between Sections twenty-six (26) and twenty-seven (27) in Township nineteen (19) south of Range twenty-six (26) east, marked by pipe number fifteen (15); thence south twenty-eight (28) minutes west four hundred nineteen and five-tenths
21 (419.5) feet to point of beginning as above described. Containing two and seventy-nine hundredths (2.79) acres.

23. That said defendant John Fidell is the owner of the following described three tracts of land:

A tract of land in the northeast quarter (NE¼) of the southwest quarter (SW¼) of Section twenty-six (26), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the northwest corner of the northeast quarter (NE¼) of the southwest quarter (SW¼) of Section twenty-six (26), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south twenty-eight (28) minutes west one hundred thirty-five and one-tenth (135.1) feet on subdivision line to pipe number thirty-four (34); thence north thirty-two (32) degrees and twenty-eight (28) minutes east one hundred seventy-four and three-tenths (174.3) feet to pipe number thirty-six (36); thence north eighty-nine (89) degrees and fifty-five minutes (55) west one hundred fifteen and five-tenths (115.5) feet on subdivision line to the point of beginning as above described. Containing four-hundredths (.04) acres.

A tract of land in the southwest quarter (SW¼) of the northeast quarter (NE¼) of Section twenty-six (26), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the northwest corner of the southwest quarter (SW¼) of the northeast quarter (NE¼) of Section twenty-six, Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south twenty-eight (28) minutes west three hundred ninety-five and seven-tenths (395.7) feet on subdivision line to pipe number thirty-nine (39); thence north fifty-four degrees (54) and twelve (12) minutes east six hundred seventy-five and three-tenths (675.3) feet to pipe number forty (40); thence north eight-nine (89) degrees and fifty-five (55) minutes west five hundred forty-four and three-tenths (544.3) feet on subdivision line to the point of beginning as above described. Containing one and seven-tenths (1.7) acres.

A tract of land in the northeast quarter of the northeast quarter (NE¼ of NE¼) of Section twenty-six (26), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the northwest corner of the northeast quarter (NE¼) of Section twenty-six (26), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south twenty-eight (28) minutes west ten hundred sixty-five and three-tenths (1065.3) feet on subdivision line to pipe number forty-two (42); thence north seventy-two degrees (72) and fifty-one minutes (51) east, four hundred ninety-seven (497)

feet; thence north nineteen (19) degrees and fourteen (14) minutes west six hundred (600) feet; thence north thirty-four (34) degrees and forty-five (45) minutes east, four hundred twenty-eight (428) feet to pipe number forty-five (45); thence north eighty-nine (89) degrees and fifty-five (55) minutes west five hundred eleven and nine-tenths (511.9) feet on section line to point of beginning as above described. Containing seven and seven-hundredths (7.07) acres.

22 24. That said defendant John Carothers and Benjamin D. Conklin and Mrs. Anna C. Bentley are the owners, or claim interest in the following described six tracts of land, to-wit:

A tract of land in the southwest quarter (SW¼) of the northwest quarter (NW¼) of Section twenty-six (26), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the west one-quarter (¼) corner of Section twenty-six (26), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south eighty-nine (89) degrees and fifty-five (55) minutes east three hundred eighty-six (386) feet on subdivision line to pipe number thirty-one (31); thence north thirty-one (31) degrees and forty-eight (48) minutes east three hundred eighteen and eight-tenths (318.8) feet; thence south sixty-two (62) degrees and thirteen (13) minutes east five hundred eight-three and four-tenths (583.4) feet to pipe number thirty-three (33); thence south eighty-nine (89) degrees and fifty-five (55) minutes east two hundred fifty-eight and seven-tenths (258.7) feet on subdivision line to the southeast corner of the southwest quarter (SW¼) of the northwest quarter (NW¼) of said section; thence north twenty-eight (28) minutes east twelve hundred fifteen and eight-tenths (1215.8) feet on subdivision line to pipe number eighteen (18); thence south thirty-one (31) degrees and twenty-two (22) minutes west two hundred seven and two-tenths (207.2) feet to pipe number seventeen (17); thence south fifty-two (52) degrees and fifty-four (54) minutes west, three hundred ninety-nine and seven-tenths (399.7) feet to pipe number sixteen (16); thence north eighty-eight (88) degrees and fifty-six (56) minutes west nine hundred four and seven-tenths (904.7) feet to point on section line between Sections twenty-six (26) and twenty-seven (27) in Township nineteen (19) south of Range twenty-six (26) east, marked by pipe number fifteen (15); thence south twenty-eight (28) minutes west eight hundred fifteen and two-tenths (815.2) feet on said section line to the point of

beginning as above described. Containing twenty-one and sixty-two hundredths (21.62) acres.

A tract of land in the southeast quarter (SE¼) of the northwest quarter (NW¼) of Section twenty-six (26), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southwest corner of the southeast quarter (SE¼) of the northwest quarter (NW¼) of Section twenty-six (26), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south eighty-nine (89) degrees and fifty-five (55) minutes east one hundred fifteen and five-tenths (115.5) feet on subdivision line to pipe number thirty-six; thence north thirty-two (32) degrees and twenty-eight (28) minutes east seven hundred twenty-five and seven-tenths (725.7) feet; thence north seventy-seven (77) degrees and thirty (30) minutes east six hundred (600) feet; thence north fifty-four (54) degrees and twelve (12) minutes east three hundred one and seven-tenths (301.7) feet to pipe number thirty-nine (39); thence north twenty-eight minutes (28) east three hundred ninety-five and seven-tenths (395.7) feet on subdivision line to the northeast corner of the southeast quarter (SE¼) of the northwest quarter (NW¼) of said section; thence north eighty-nine (89) degrees and fifty-five (55) minutes west twelve hundred sixty-nine and three-tenths
23 (1269.3) feet on subdivision line to pipe number nineteen (19); thence south thirty-one (31) degrees and twenty-two (22) west one hundred twenty- one and seven-tenths (121.7) feet to pipe number eighteen (18); thence south twenty-eight (28) minutes west twelve hundred fifteen and eight-tenths (1215.8) feet on subdivision line to the point of beginning as above described, containing twenty-one (21) acres.

A tract of land in the northeast quarter (NE¼) of the northwest quarter (NW¼) of Section twenty-six (26), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southeast corner of the northeast quarter (NE¼) of the northwest quarter (NW¼) of Section twenty-six (26), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south eighty-nine (89) degrees and fifty-five minutes west twelve hundred sixty-nine and three-tenths (1269.3) feet on subdivision line to pipe number nineteen (19); thence north thirty-one (31) degrees and twenty-two (22) minutes east one hundred fifty-five (155) feet

to pipe number twenty (20); [thence] north sixty-eight (68) degrees and seventeen minutes (17) east, twelve hundred seventy-nine and three-tenths (1279.3) feet to pipe number twenty-one (21); thence south twenty-eight (28) minutes west six hundred fourteen and eight-tenths (614.8) feet on the subdivision line to the point of beginning as above described. Containing ten and fifty-two hundredths (10.52) acres.

A tract of land in the northwest quarter ($NW^1/_4$) of the northeast quarter ($NE^1/_4$) of Section twenty-six (26), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southwest corner of the northwest quarter of the northeast quarter ($NW^1/_4$ of $NE^1/_4$) of Section twenty-six (26), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south eighty-nine (89) degrees and fifty-five (55) minutes east five hundred forty-four and three-tenths (544.3) feet on subdivision line to pipe number forty (40); thence north fifty-four (54) degrees and twelve (12) minutes east twenty-three (23) feet; thence north seventy-two (72) degrees and fifty-one (51) minutes east eight hundred three (803.) feet to pipe number forty-two (42); thence north twenty-eight (28) minutes east ten hundred sixty-five and three-tenths (1065.3) feet on subdivision line to the northeast corner of the northwest quarter ($NW^1/_4$) of the northeast quarter ($NE^1/_4$) of said section; thence north eighty-nine (89) degrees and fifty-five (55) minutes west six hundred sixty-four and seven-tenths (664.7) feet on section line to pipe number twenty-four (24); thence south thirty-two (32) minutes east four hundred seventy-five and seven-tenths (475.7) feet to pipe number twenty-[three (23); thence south forty-six (46) and forty-four (44) minutes] three (23); thence south forty-six (46) degrees and forty-four (44) minutes west four hundred sixty-seven and six-tenths (467.6) feet to pipe number twenty-two (22); thence north seventy-three (73) degrees and fifty-eight (58) minutes west three hundred forty-six and seven-tenths (346.7) feet to pipe number twenty-one (21); thence south twenty-eight (28) minutes west six hundred fourteen and eight-tenths (614.8) feet on subdivision line to the point of beginning as above described. Containing twenty-five and seventy-nine hundredths (25.79) acres.

24 A tract of land in the southwest quarter ($SW^1/_4$) of the southeast quarter ($SE^1/_4$) of Section twenty-three (23), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the northeast corner of the southwest quarter (SW¼) of the southeast quarter (SE¼) of Section twenty-three (23), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south thirteen hundred twenty-seven and four-tenths (1327.4) feet to the southeast corner of the southwest quarter (SW¼) of the southeast quarter (SE¼) of said section; thence north eighty-nine (89) degrees and fifty-five (55) minutes west six hundred sixty-four and seven-tenths (664.7) feet on section line to pipe number twenty-four (24); thence north one (1) degree and fifty-eight (58) minutes east six hundred twenty (620) feet to pipe number twenty-five (25); thence south eighty-seven (87) degrees and twenty-seven (27) minutes west two [thundred] fifty-four and two-tenths (254.2) feet to pipe number twenty-six (26); thence south fifty-nine (59) degrees and forty-six (46) minutes west four hundred ninety-nine and two-tenths (499.2) feet to pipe number twenty-seven (27); thence north nine hundred sixty-eight and one-tenth (968.1) feet to the northwest corner of the southwest quarter (SW¼) of the southeast quarter (SE¼) of said section 23, being marked by pipe number thirty (30); thence north eighty-nine (89) degrees and fifty-eight (58) minutes east thirteen hundred twenty-eight and one-tenth (1328.1) feet on subdivision line to the point of beginning as above described. Containing thirty-one and seventy-nine hundredths (3179) acres.

A tract of land in the southeast quarter (SE¼) of the southwest quarter (SW¼) of Section twenty-three (23), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the northeast corner of the southeast quarter (SE¼) of the southwest quarter (SW¼) of Section twenty-three (23), Township nineteen (19) south of range twenty-six (26) east, N. M. P. M.; thence south nine hundred sixty-eight and one-tenth (968.1) feet on subdivision line to pipe number twenty-seven (27); thence north fifty-five (55) degrees and forty-nine (49) minutes west ten hundred fifty-nine and one-tenth (1059.1) feet to pipe number twenty-eight (28); thence north nine degrees and twenty-six (26) minutes west three hundred seventy-seven and five-tenths (377.5) feet to pipe number twenty-nine (29); thence north eighty-nine (89) degrees and fifty-eight (58) minutes east nine hundred thirty-seven and eight-tenths (937.8) feet on subdivision line to point of beginning as above described, being marked by pipe number thirty (30). Containing thirteen and seventy-three hundredths (13.73) acres.

25. The said defendant Mary Fidell is the owner of the following described two tracts of land, to-wit:

A tract of land in the southeast quarter (SE¼) of southeast quarter (SE¼) of Section twenty-three (23), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southwest corner of the southeast quarter (SE¼) of the southeast quarter (SE¼) of Section
25 twenty-three (23), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south eighty-nine (89) degrees and fifty-five (55) minutes east five hundred eleven and nine-tenths (511.9) feet on section line to pipe number forty-five (45); thence north thirty-three (33) degrees and ten (10) minutes east ten hundred seventy-two (1072) feet; thence north fifty-six degrees (56) and forty (40) minutes west seven hundred ninety (790) feet to pipe number forty-seven (47); thence south eighty-nine (89) degrees and fifty-eight (58) minutes west four hundred thirty-seven (437) feet on subdivision line to the northwest corner of the southeast quarter (SE¼) of the southeast quarter (SE¼) of said section twenty-three (23); thence south thirteen hundred twenty-seven and four-tenths (1327.4) feet to the point of beginning as above described. Containing twenty-one and fifty-one hundredths (21.51) acres.

A tract of land in the southwest quarter (SW¼) of the northwest quarter (NW¼) of Section twenty-four (24), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the northwest corner of the southwest quarter (SW¼) of the northwest quarter (NW¼) of Section twenty-four (24), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south nine hundred eighteen (918) feet on section line to pipe number fifty-one (51); thence north sixty-eight (68) degrees and forty (40) minutes east three hundred forty-two (342) feet; thence north fifty-one (51) degrees and ten (10) minutes east six hundred (600) feet; thence north eighty (80) degrees and fifty-two (52) minutes east five hundred thirty-six (536) feet to pipe number fifty-four (54); thence north three hundred thirty-two and five-tenths 332.5) feet to the northeast corner of the southwest quarter (SW¼) of the northwest quarter (NW¼) of said section twenty-three (23); thence south eighty-nine (89) degrees and fifty-nine minutes west thirteen

hundred eighteen and six-tenths (1318.6) feet to the point of beginning as above described. Containing fifteen and sixteen-hundredths (15.16) acres.

26. That said defendant Annie B. McHenry is the owner of the following described four tracts of land, to-wit:

The northwest quarter (NW¼) of the southeast quarter (SE¼) of Section twenty-three (23), Township nineteen (19) south of Range twenty-six (26) east of New Mexico Principal Meridian, containing forty (40) acres.

A tract of land in the northeast quarter (NE¼) of the southeast quarter (SE¼) of Section twenty-three (23), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southwest corner of the northeast quarter (NE¼) of the southeast quarter (SE¼) of Section twenty-three (23), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence north eighty-nine (89) degrees and fifty-eight (58) minutes east four hundred thirty-seven (437) feet on subdivision line to pipe number forty-seven (47); thence north fifty six (56) degrees and forty (40) minutes west four hundred ten (410) feet; thence north twenty-five (25) degrees and three (3) minutes east twelve hundred twenty and four-tenths (1220.4) feet to pipe
26 number forty-nine (49); thence south eighty-nine (89) degrees and fifty (50) minutes west six hundred eleven and two-tenths (611.2) feet on subdivision line to the northwest corner of the northeast quarter (NE¼) of the southeast quarter (SE¼) of said section; thence south thirteen hundred twenty-seven and four-tenths (1327.4) feet to point of beginning as above described. Containing eight and sixty-one hundredths (8.61) acres.

A tract of land in the southeast quarter (SE¼) of the northeast quarter (NE¼) of Section twenty-three (23), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southwest corner of the southeast quarter (SE¼) of the northeast quarter (NE¼) of Section twenty-three (23), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence north eighty-nine (89) degrees and fifty (50) minutes east six hundred eleven and two-tenths (611.2) feet on subdivision line to pipe number forty-nine (49); thence north twenty-five (25) degrees and three (3) minutes east one hundred seventy-nine and six-tenths (1796)

feet; thence north sixty-eight (68) degrees and forty (40) minutes east six hundred eight-eight (688) feet to pipe number fifty-one (51); thence north nine hundred eighteen (918) feet on section line to the northeast corner of the southeast quarter (SE¼) of the northeast quarter (NE¼) of said section; thence south eighty-nine (89) degrees and forty (40) minutes west thirteen hundred twenty-eight and one-tenth (1328.1) feet to the northwest corner of the southeast quarter (SE¼) of the northeast quarter (NE¼) of said section; thence south thirteen hundred twenty-eight and two-tenths (1328.2) feet to the point of beginning as above described. Containing thirty-four and forty-five hundredths (34.25) acres.

A tract of land in the southwest quarter (SW¼) of the northeast quarter (NE¼) of Section twenty-three (23), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the center of Section twenty-three (23), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence north twenty-six (26) degrees and thirty-two (32) minutes east eight hundred seventy-five and eight-tenths (875.8) feet to pipe number thirty-two; thence south eighty-nine (89) degrees and twenty-five (25) minutes east three hundred seventy-three and seven-tenths (373.7) feet to pipe number thirty-three (33); thence north seventeen (17) degrees and fourteen (14) minutes east five hundred seventy-six (576) feet to pipe number thirty-four (34); thence north eighty-nine (89) degrees and forty (40) minutes east three hundred ninety-four (394) feet on subdivision line to the northeast corner of the southwest quarter (SW¼) of the northeast quarter (NE¼) of said section; thence south thirteen hundred twenty-eight and two-tenths (1328.2) feet on subdivision line to the southeast corner of the southwest quarter (SW¼) of the northeast quarter (NE¼) of said section; thence south eighty-nine (89) degrees and fifty (50) minutes west thireen hundred twenty-eight and one-tenth (1328.1) feet on subdivision line to point of beginning as above described. Containing twenty-five and sixty-five hundredths (25.65) acres.

27. That said defendants John H. Hayhurst and William L. Rogers are the owners of the following described tract of land, to-wit:

27 A tract of land in the southeast quarter (SE¼) of the northwest quarter (NW¼) of Section twenty-four (24), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the northwest corner of the southeast quarter (SE¼) of the northwest quarter (NW¼) of Section twenty-four (24), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south three hundred thirty-two and five-tenths (332.5) feet on subdivision line to pipe number fifty-four (54); thence north eighty (80) degrees and fifty-two minutes east [two] two hundred sixty-four (264) feet; thence north sixty-three (63) degrees and twenty-six (26) minutes east, six hundred forty-nine and seven-tenths (649.7) feet to pipe number fifty-six (56); thence south eighty-nine (89) degrees and fifty-nine (59) minutes west eight hundred forty-one and eight-tenths (841.8) feet on subdivision line to the point of beginning as above described. Containing two and nineteen-hundredths (2.19) acres.

28. That said defendant R. W. Rankin is the owner of the following described six tracts of land, to-wit:

A tract of land described as follows:

The northwest quarter (NW¼) of the northwest quarter (NW¼) of Section twenty-four (24), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, containing forty (40) acres.

A tract of land in the northeast quarter (NE¼) of the northwest quarter (NW¼) of Section twenty-four (24), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the north one-quarter (¼) corner of Section twenty-four (24), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south eighty-nine (89) degrees and fifty-nine (59) minutes west thirteen hundred eighteen and six-tenths (1318.6) feet to the northwest corner of the northeast quarter (NE¼) of the northwest quarter (NW¼) of said section; thence south thirteen hundred thirty-one and nine-tenths (1331.9) feet on subdivision line to the southwest corner of the northeast quarter (NE¼) of the northwest quarter (NW¼) of said section; thence north eighty-nine (89) degrees and fifty-nine (59) minutes east eight hundred forty-one and eight-tenths (841.8) feet on subdivision line to pipe number fifty-six (56); thence north sixty-three (63) degrees and twenty-six (26) minutes east five hundred thirty-three and one-tenth (533.1) feet to pipe number fifty-seven (57); thence north ten hundred ninety-two and eight-tenths (1092.8) feet on subdivision line to the point of beginning as above described. Containing thirty-seven and sixty-one hundredths (37.61) acres.

A tract of land in the northwest quarter (NW¼) of the northeast quarter (NE¼) of Section twenty-four (24), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

28 Beginning at the north one-quarter (¼) corner of Section twenty-four (24), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south ten hundred ninety-two and eight-tenths (1092.8) feet on subdivision line to pipe number fifty-seven (57); thence north sixty-three (63) degrees and twenty-six (26) minutes east, seventeen and two-tenths (17.2) feet; thence north twenty-four (24) degrees and thirty-nine (39) minutes east ten hundred feet (1000); thence north five (5) degrees and twenty-one (21) minutes west one-hundred seventy-seven (177) feet to pipe number sixty (60); thence south eighty-nine (89) degrees and fifty-nine (59) minutes west four hundred sixteen (416) feet on section line between Sections thirteen (13) and twenty-four (24) in Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., to the point of beginning as above described. Containing five and twenty-hundredths (5.20) acres.

A tract of land in the southwest quarter (SW¼) of the southwest quarter (SW¼) of Section thirteen (13), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southwest corner of Section thirteen (13), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence north fourteen (14) minutes west one hundred sixty-two and four-tenths (162.4) feet on section line between Sections thirteen (13) and fourteen (14), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., to pipe number forty (40); thence south eighty-four (84) degrees and thirty-three (33) minutes east four hundred thirty and four-tenths (430.4) feet to pipe number forty-one (41); thence north thirty-six (36) degrees and twenty-six (26) minutes east three hundred thirteen and five-tenths (313.5) feet to pipe number forty-two (42); thence north sixty-seven (67) degrees and forty-six (46) minutes east seven hundred fifty-eight and two-tenths (758.2) feet to pipe number forty-three (43); thence south fourteen (14) minutes east six hundred sixty-two and two-tenths (662.2) feet on subdivision line to the southeast corner of the southwest quarter (SW¼) of the southwest quarter (SW¼) of said Section thirteen (13); thence south eighty-nine (89) degrees and fifty-nine (59) minutes west thirteen hundred eighteen and six-tenths (1318.6)

feet on section line between Sections thirteen (13) and twenty-four (24) in Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., to the point of beginning as above described. Containing ten and eighty-hundredths (10.80) acres.

A tract of land in the southeast quarter (SE¼) of the southwest quarter (SW¼) of Section thirteen (13), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the south one-quarter (¼) corner of Section thirteen (13), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south eighty-nine (89) degrees and fifty-nine (59) minutes west thirteen hundred eighteen and six-tenths (1318.6) feet on section line between Sections thirteen (13) and twenty-four (24) to the southwest corner of the southeast quarter (SE¼) of the southwest quarter (SW¼) of Section thirteen (13), all in Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence
29 north fourteen (14) minutes west six hundred sixty-two and two-tenths (662.2) feet on subdivision line to pipe number forty-three (43); thence north sixty-six degrees and four (4) minutes east two hundred forty-eight and three-tenths (248.3) feet to pipe number forty-four (44); thence north eight (8) degrees and fifty-three (53) minutes west four hundred twenty-one and four-tenths (421.4) feet to pipe number forty-five (45); thence north forty-seven (47) degrees and thirty (30) minutes west two hundred twenty-one and three-tenths (221.3) feet to the northwest corner of the southeast quarter (SE¼) of the southwest quarter (SW¼) of said Section thirteen (13); also marked by pipe number forty-six (46); thence north eighty-nine (89) degrees and fifty-nine (59) minutes east thirteen hundred eighteen and one-tenth (1318.1) feet on subdivision line to the northeast corner of the southeast quarter (SE¼) of the southwest quarter (SW¼) of said section; thence south fourteen (14) minutes east thirteen hundred twenty-nine and two-tenths (1329.2) feet on subdivision line to the point of beginning as above described. Containing thirty-seven and fifty-four hundredths (37.54) acres.

A tract of land in the northeast quarter (NE¼) of the southwest quarter (SW¼) of Section thirteen (13), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the northwest corner of the northeast quarter (NE¼) of the southwest quarter (SW¼) of Section thirteen

(13), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., being marked by pipe number forty-six (46); thence north fourteen (14) minutes west three hundred fifty-four and seven-tenths (354.7) feet on subdvision line to pipe number forty-seven (47); thence south eighty-six (86) degrees and sixteen (16) minutes east four hundred sixty-three and two-tenths (463.2) feet to pipe number forty-eight (48); thence north twenty-seven (27) degrees and twelve (12) minutes east eleven hundred twenty-seven and seven-tenths (1127.7) feet to pipe number forty nine (49); thence north eighty-nine (89) degrees and fifty-nine (59) minutes east three hundred thirty-five and one-tenth (335.1) feet on subdivision line to the northeast corner of the northeast quarter (NE¼) of the southwest quarter (SW¼) being the center of said section; thence south fourteen (14) minutes east thirteen hundred twenty-nine and two-tenths (1329.2) feet on subdivision line to the southeast corner of the northeast quarter (NE¼) of the southwest quarter (SW¼) of said section; thence south eighty-nine (89) degrees and fifty-nine (59) minutes west thirteen hundred eighteen and one-tenth (1318.1) feet to the point of beginning as above described. Containing twenty-three and forty-four hundredths (23.44) acres.

29. That said defendant Henry Zajic is the owner of the following described tract of land, to-wit:

A tract of land in the southeast quarter (SE¼) of the northwest quarter (NW¼) of Section thirteen (13), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the center of Section thirteen (13), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M; thence south eighty-nine (89) degrees and fifty-nine (59) minutes west three hundred thirty-five and one-tenth
30 (335.1) feet on subdivision line to pipe number forty-nine (49); thence north fifty-four (54) degrees and forty-one (41) minutes east four hundred ten and three-tenths (410.3) feet to pipe number fifty (50); thence south fourteen (14) minutes east two hundred thirty-two and two-tenths (232.2) feet on sub-division line to the point of beginning as above described. Contining ninety-five hundredths (.95) acres.

30. That said defendants John W. Shanner and W. B. Clark are the owners of the following described three tracts of land, to-wit:

A tract of land in the southwest quarter (SW¼) of the northeast quarter (NE¼) of Section thirteen (13), Township nineteen (19) south of Range twenty-six east, New Mexico Principal Meridian, described as follows:

Beginning at the center of Section thirteen (13), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence north fourteen (14) minutes west two hundred thirty-two and two-tenths (232.2) feet on subdivision line to pipe number fifty (50); thence north sixty-three (63) degrees and thirty-three (33) minutes east six hundred twenty-nine and two-tenths (629.2) feet to pipe number fifty-one (51); thence north twenty-two (22) degrees and thirty-nine (39) minutes east three hundred feet (300) to pipe number fifty-two (52); thence south eighty-eight degrees and two (2) minutes east five hundred thirty-seven (537) feet to pipe number fifty-three (53); thence north twelve (12) degrees and fifty-two (52) minutes east four hundred forty (440) feet to pipe number fifty-four (54); thence south fourteen (14) minutes east twelve hundred five (1205) feet on subdivision line to the southeast corner of the southwest quarter (SW¼) of the northeast quarter (NE¼) of said section; thence south eighty-nine (89) degrees and fifty-nine (59) minutes west thirteen hundred eighteen and four-tenths (1318.4) feet on subdivision line to the point of beginning as above described. Containing eighteen and forty-five hundredths (18.45) acres.

A tract of land in the southeast quarter (SE¼) of the northeast quarter (NE¼) of Section thirteen (13), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southwest corner of the southeast quarter (SE¼) of the northeast quarter (NE¼) of Section thirteen (13), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence north fourteen (14) minutes twelve hundred five (1205) feet on subdivision line to pipe number fifty-four (54); thence north forty-seven (47) degrees and fifty-four (54) minutes east one hundred eighty-five (185) feet to pipe number fifty-five (55); thence north eighty-nine (89) degrees and fifty-nine (59) minutes east eleven hundred eighty and seven-tenths (1180.7) feet on subdivision line to the northeast corner of the southeast quarter (SE¼) of the northeast quarter (NE¼) of said section; thence south fourteen (14) minutes east seven hundred eleven and nine-tenths (711.9) feet on section line between Sections thirteen (13), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., and Section eighteen (18), Township nineteen

(19) south of Range twenty-seven (27) east, N. M. P. M., to point marked by pipe number sixty-eight (68); thence south thirty-three (33) degrees and forty-eight (48) minutes west seven hundred forty-three and one-tenth (743.1) feet to pipe number sixty-seven (67); thence south eighty-nine (89)
31 degrees and fifty-nine (59) minutes west nine hundred two and four-tenths (902.4) feet on subdivision line to the point of beginning as above described. Containing [thirt-six] and two hundredths (36.02) acres.

A tract of land in the northeast quarter (NE¼) of the northeast quarter (NE¼) of Section thirteen (13), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southeast corner of the northeast quarter (NE¼) of the northeast quarter (NE¼) of Section thirteen (13), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south eighty-nine (89) degrees and fifty-nine (59) minutes west eleven hundred eighty and seven-tenths (1180.7) feet to pipe number fifty-five (55); thence north fifty (50) degrees and fifty-two (52) minutes east eight hundred six and three-tenths (806.3) feet to pipe number fifty-six (56); thence north thirty-nine (39) degrees and twenty-two (22) minutes east eight [hudnerd] sixty-seven and two-tenths (867.2) feet to pipe number fifty-seven (57); thence south fourteen (14) minutes east eleven hundred eighty and seven-tenths (1180.7) feet on section line between Section thirteen (13), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., and Section eighteen (18), Township nineteen (19) south of Range twenty-seven (27) east, N. M. P. M., to the point of beginning as above described. Containing fourteen and thirty-seven hundredths (14.37) acres.

31. That said defendant E. H. Vance is the owner of the following described two tracts of land, to-wit:

A tract of land in the southwest quarter (SW¼) of the southwest quarter (SW¼) of Section seven (7), Township nineteen (19) south of Range twenty-seven (27) east, New Mexico Principal Meridian, described as follows:

Beginning at the southeast corner of the southwest quarter (SW¼) of the southwest quarter (SW¼) of Section seven (7), Township nineteen (19) south of Range twenty-seven (27) east, N. M. P. M.; thence west eleven hundred ninety-seven and eight-tenths (1197.8) feet on section line between Section seven (7) and eighteen (18) in Township nineteen

(19) south of Range twenty-seven (27) east, N. M. P. M., to pipe number fifty-eight (58); thence north seventy-four (74) degrees and eighteen (18) minutes east three hundred forty-six and six-tenths (346.6) feet to pipe number fifty-nine (59); thence north thirty-six (36) degrees and thirty-six (36) minutes east six hundred forty-three and two-tenths (643.2) feet to pipe number sixty (60); thence north thirteen (13) degrees and twenty-eight (28) minutes west four hundred fifty and three-tenths (450.3) feet to pipe number sixty-one (61); thence north eighty-six (86) degrees and forty-one (41) minutes west seven hundred twenty-five and six-tenths (725.6) feet to pipe number sixty-two (62); thence north twenty-four (24) minutes west two hundred thirty-six and three-tenths (236.3) feet on section line between Sections twelve (12), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., and Section seven (7), Township nineteen (19) south of Range twenty-seven (27) east, N. M. P. M., to the northwest corner of the southwest quarter (SW¼) of the southwest quarter (SW¼) of said Section seven (7); thence east thirteen hundred three and two-tenths (1303.2) feet on subdivision line to the northeast corner of the southwest quarter (SW¼) of the southwest quarter (SW¼) of said Section seven (7); thence south twenty-seven (27) minutes east thirteen hundred twenty-six and five-tenths (1326.5) feet on subdivision line to the point of beginning as above described. Containing twenty-three and fifty-nine hundredths (23.59) acres.

A tract of land in the northwest quarter (NW¼) of the northwest quarter (NW¼) of Section eighteen (18), Township nineteen (19), south of Range twenty-seven (27) east, New Mexico Principal Meridian, described as follows:

Beginning at the southwest corner of the northwest quarter (NW¼) of the northwest quarter (NW¼) of Section eighteen (18), Township nineteen (19) south of Range twenty-seven (27) east, N. M. P. M.; thence east four hundred thirteen and six-tenths (413.6) feet on subdivision line to pipe number sixty-nine (69); thence north twenty-nine (29) degrees and fifty-nine (59) minutes east five hundred forty-eight and one-tenth (548.1) feet; thence north forty-six (46) degrees and eighteen (18) minutes east six hundred (600) feet; thence north sixty-one (61) degrees and twenty-five (25) minutes east two hundred nine and five-tenths (209.5) feet to pipe number seventy-two (72); thence north twenty-seven (27) minutes west three hundred forty-one and three-tenths (341.3) feet to the northeast corner of the northwest quarter (NW¼) of the northwest quarter (NW¼) of said Section

eighteen (18); thence west eleven hundred ninety-seven and eight-tenths (1197.8) feet on section line between Sections eighteen (18) and seven (7) in Township nineteen (19) south of Range twenty-seven (27) east, N. M. P. M.; to point marked by pipe number fifty-eight (58); thence south thirty-five (35) degrees and thirty-five minutes west one hundred eighty-two and two-tenths (182.2) feet to pipe number fifty-seven (57); thence south fourteen (14) minutes east eleven hundred eighty and seven-tenths (1180.7) feet on section line between Section thirteen (13), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., and Section eighteen (18), Township nineteen (19) south of Range twenty-seven (27) east, N. M. P. M., to the point of beginning as above described. Containing twenty-six and fifty-hundredths (26.50) acres.

32. That said defendant Curtis V. Yoh is the owner of the following described two tracts of land, to-wit:

A tract of land in the southwest quarter (SW¼) of the southeast quarter (SE¼) of Section seven (7), Township nineteen (19) south of Range twenty-seven (27) east, New Mexico Principal Meridian, described as follows:

Beginning at the northwest corner of the southwest quarter (SW¼) of the southeast quarter (SE¼) of Section seven (7), Township nineteen (19) south of Range twenty-seven (27) east, N. M. P. M.; thence south twenty-seven (27) minutes east eight hundred ninety-one and one-tenth (891.1) feet on subdivision line to pipe number seventy-five (75); thence north fifty-four (54) degrees and fifty (50) minutes east eighty hundred and fifty-seven and seven-tenths (857.7) feet; thence north twenty-eight (28) degrees and twenty-five (25) minutes east four hundred fifty-one and five-tenths (451.5) feet to pipe number seventy-eight (78); thence west four hundred ninety-three and four-tenths (493.4) feet on subdivision line to the point of beginning as above described. Containing
33 seven and sixty-nine hundredths (7.69) acres.

A tract of land in the northwest quarter (NW¼) of the southeast quarter (SE¼) of Section seven (7), Township nineteen (19) south of Range twenty-seven (27) east, New Mexico Principal Meridian, described as follows:

Beginning at the southwest corner of the northwest quarter (NW¼) of the southeast quarter (SE¼) of Section seven (7), Township nineteen (19) south of Range twenty-seven (27) east, N. M. P. M.; thence east four hundred ninety-three and four-tenths (493.4) feet on subdivision line to pipe number seventy-eight (78); thence north twenty-eight (28) de-

grees and twenty-five (25) minutes west five hundred forty-eight and five-tenths (548.5) feet; thence north seventy-five (75) degrees and fifty-nine (59) minutes west two hundred forty-four and nine-tenths (244.9) feet to pipe number eighty (80); thence south twenty-seven (27) minutes east five hundred forty-one and seven-tenths (541.7) feet on subdivision line to the point of beginning as above described. Containing three and two-hundredths (3.02) acres.

33. That defendant C. E. Vaughn is the owner of the following described two tracts of land, to-wit:

A tract of land in the northwest quarter (NW¼) of the southwest quarter (SW¼) of Section seven (7), Township nineteen (19) south of Range twenty-seven (27) east, New Mexico Principal Meridian, described as follows:

Beginning at the west one-quarter (¼) corner of Section seven (7), Township nineteen (19) south of Range twenty-seven (27) east, N. M. P. M.; thence south twenty-four (24) minutes east thirteen hundred twenty-six and five-tenths (1326.5) feet on section line between Section twelve (12), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., and Section seven (7), Township nineteen (19) south of Range twenty-seven (27) east, N. M. P. M.; thence east thirteen hundred three and two-tenths (1303.2) feet on subdivision line to the southeast corner of the northwest quarter (NW¼) of the southwest quarter (SW¼) of said Section (7); thence north twenty-seven (27) minutes west ten hundred fifty-one and nine-tenths (1051.9) feet on subdivision line to pipe number eighty-two (82); thence north fifty-two (52) degrees twenty-five (25) minutes west four hundred five and nine-tenths (405.9) feet to pipe number eighty-three (83); thence west nine hundred eighty-two and five-tenths (982.5) feet on subdivision line to the point of beginning as above described. Containing thirty-seven and ninty-one hundredths (37.91) acres.

A tract of land in the northeast quarter (NE¼) of the southwest quarter (SW¼) of Section seven (7), Township nineteen (19) south of Range twenty-seven (27) east, New Mexico Principal Meridian, described as follows:

Beginning at the southwest corner of the northeast quarter (NE¼) of the southwest quarter (SW¼) of Section seven (7), Township nineteen (19) south, Range twenty-seven (27) east, N. M. P. M.; thence east thirteen hundred twenty (1320) feet on subdivision line to the southeast corner of the
34 northeast quarter (NE¼) of the southwest quarter (SW¼) of said section; thence north twenty-seven

(27) minutes west five hundred forty-one and seven-tenths (541.7) feet on subdivision line to pipe number eighty (80); thence north seventy-five degrees (75) and fifty-nine (59) minutes west nine hundred fifty-five and one-tenth (955.1) feet; thence north fifty-two (52) degrees and twenty-five (25) minutes west five hundred one and five-tenths (501.5) feet to pipe number eighty-two (82); thence south twenty-seven (27) minutes east ten hundred fifty-one and nine-tenths (1051.9) feet on subdivision line to the point of beginning as above described. Containing twenty and fifty-hundreths (20.50) acres.

34. That said defendant J. J. Alexander is the owner of the following described three tracts of land, to-wit:

A tract of land described as follows:

The east one-half ($E^1/_2$) of the northeast quarter ($NE^1/_4$) of Section twelve (12), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, containing eighty (80) acres.

A tract of land in the southwest quarter ($SW^1/_4$) of the northwest quarter ($NW^1/_4$) of Section seven (7), Township nineteen (9), South of Range twenty-seven (27) east, New Mexico Principal Meridian, described as follows:

Beginning at the west one-quarter ($^1/_4$) corner of Section seven (7), Township nineteen (19) south of Range twenty-seven (27) east, N. M. P. M.; thence east nine hundred eighty-two and five tenths (982.5) feet on subdivision line to pipe number eighty-three (83); thence north twenty-six (26) degrees and fifty (50) minutes west ten hundred (1000) feet; thence north seven (7) degrees and fifty (50) minutes west three hundred eighty-one and eight tenths (381.8) feet to pipe number eighty-six; thence west four hundred fourteen and nine-tenths (414.9) feet on subdivision line to the northwest corner of the southwest quarter ($SW^1/_4$) of the northwest quarter ($NW^1/_4$) of said section; thence south twenty-four (24) minutes east thirteen hundred twenty-six and five-tenths (1326.5) feet on section line between Section twelve (12), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., and Section seven (7), Township nineteen (19) south of Range twenty-seven (27) east, N. M. P. M., to the point of beginning as above described. Containing seventeen and twelve-hundredths (17.12) acres.

A tract of land in the northwest quarter ($NW^1/_4$) of the northwest quarter ($NW^1/_4$) of section seven (7), Township

nineteen (19), south of Range twenty-seven (27) east, New Mexico Principal Meridian, described as follows:

Beginning at the northwest corner of Section seven (7) Township nineteen (19) south of Range twenty-seven (27) east, N. M. P. M.; thence south twenty-four (24) minutes east thirteen hundred twenty-six and five-tenths (1326.5) feet on section line between Section twelve (12), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., and Section seven (7), Township nineteen (19) south of Range twenty-seven (27) east, N. M. P. M., to the southwest corner of the northwest quarter (NW¼) of the northwest
35 quarter (NW¼) of said Section seven (7); thence east four hundred fourteen and nine-tenths ((414.9) feet on subdivision line to pipe number eighty-six (86); thence north seven (7) degrees and fifty (50) minutes west eight hundred eighteen and two-tenths (818.2) feet; thence north eighteen (18) degrees and thirty (30) minutes west five hundred forty-four (544) feet to pipe number eighty-eight (88); thence west one hundred forty (140) feet on section line between Sections six (6) and seven (7) in Township nineteen (19) south of Range twenty-seven (27) east, N. M. P. M., to the point of beginning as above described. Containing seven and seventy-two hundredths (7.72) acres.

35. That said defendant Clara E. Courtney is the owner of the following described four tracts of land, to-wit:

A tract of land in the southwest quarter (SW¼) of the northeast quarter (NE¼) in Section twelve (12), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southeast corner of the southwest quarter (SW¼) of the northeast quarter (NE¼) of Section twelve (12), Township nineteen (19) south, Range twenty-six (26) east, N. M. P. M.; thence north eighty-nine (89) degrees and fifty-two (52) minutes west three hundred seventy and [there-] tenths (370.3) feet on subdivision line to pipe number seventy (70); thence north ten (10) degrees and seven (7) minutes west thirteen hundred fifty-one and eight-tenths (1351.8) feet to pipe number seventy-one (71); thence south eighty-nine (89) degrees and forty-six (46) minutes east five hundred ninety-five feet (595) to the northeast corner of the southwest quarter (SW¼) of the northeast quarter (NE¼) of said section; thence south thirty-four (34) minutes east thirteen hundred twenty-nine and two-tenths (1329.2) feet on subdivision line to the point of beginning as above described.

Containing fourteen and seventy-six hundredths (14.76) acres.

A tract of land in the northwest quarter ($NW^1/_4$) of the northeast quarter ($NE^1/_4$) in Section twelve (12), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southeast corner of the northwest quarter ($NW^1/_4$) of the northeast quarter ($NE^1/_4$) of Section twelve (12), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence north eighty-nine (89) degrees and forty-six (46) minutes west five hundred ninety-five (595) feet on subdivision line to pipe number seventy-one (71); thence north ten (10) degrees and seven (7) minutes west ten hundred fifty-three (1053) feet to pipe number seventy-two (72); thence north twenty-five (25) degrees and twenty-three (23) minutes east three hundred twenty-five (325.6) and six-tenths to pipe number seventy-three (73); thence south eighty-nine (89) degrees and forty (40) minutes east six hundred twenty-six and six-tenths (626.6) feet on section line between Sections one (1) and twelve (12) in Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., to the northeast corner of the northwest quarter ($NW^1/_4$) of the northeast quarter ($NE^1/_4$) of said Section twelve (12); thence south thirty-four (34) minutes east thirteen hundred twenty-nine and two-tenths (1329.2) feet on subdivision line to the point of beginning as above described. Containing twenty and ninety-nine hundredths (20.99) acres.

36 A tract of land in the southwest quarter ($SW^1/_4$) of the southeast quarter ($SE^1/_4$) of Section one (1), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southwest corner of the southwest quarter ($SW^1/_4$) of the southeast quarter ($SE^1/_4$) of Section one (1), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence north eighty-nine (89) degrees and forty minutes west six hundred twentysix and six-tenths (626.6) feet on section line between Sections twelve (12) and one (1) in Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., to point marked by pipe number seventy-three (73); thence north sixty-six (66) degrees and five (5) minutes west three hundred fifty-one and three-tenths (351.3) feet to pipe number seventy-four (74); thence north seventeen (17) degrees and fifty-four (54) minutes west three hundred seventy-three and five-tenths (373.5) feet to pipe

number seventy-five (75); thence south seventy-one (71) degrees and fifty-nine (59) minutes west two hundred eighty-three feet (283) to pipe number seventy-six (76); thence north seventeen (17) minutes west nine hundred twenty and six-tenths (920.6) feet on subdivision line to the northwest corner of the southwest quarter (SW¼) of the southeast quarter (SE¼) of said Section one (1); thence south eighty-nine (89) degrees and forty-four (44) minutes east thirteen hundred thirty-three and four-tenths (1333.4) feet on subdivision line to the northeast corner of the southwest quarter (SW¼) of the southeast quarter (SE¼) of said Section one (1); thence south twenty (20) minutes east thirteen hundred twenty-five and six-tenths (1325.6) feet on subdivision line to the point of beginning as above described. Containing thirty-five and eighty-one hundredths (35.81) acres.

A tract of land in the northwest quarter (NW¼) of the southeast quarter (SE¼) of Section one (1), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southwest corner of the northwest quarter (NW¼) of the southeast quarter (SE¼) of Section one (1); Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence north seventeen (17) minutes west five hundred (512.7) and seven-tenths feet on subdivision line to pipe number eighty-two (82); thence north thirteen (13) degrees and forty (40) minutes east seven hundred five and seven-tenths (705.7) feet to pipe number eighty-three (83); thence north thirty-two (32) degrees and thirty-three (33) minutes west one hundred forty-eight and seven-tenths (148.7) feet to pipe number eighty-four (84); thence south eighty-nine (89) degrees and forty-eight (48) minutes east twelve hundred forty-two and two-tenths (1242.2) feet on subdivision line to the northeast corner of the northwest quarter (NW¼) of the southeast quarter (SE¼) of said section; thence south twenty (20) minutes east thirteen hundred twenty-five and six-tenths (1325.6) feet on subdivision line to the southeast corner of the northwest quarter (NW¼) of the southeast quarter (SE¼) of said Section; thence north eighty-nine (89) degrees and forty-four (44) minutes west thirteen hundred thirty-three and four-tenths (1333.4) feet on subdivision line to the point of beginning, as above described. Containing thirty-eight and twenty-nine hundredths (38.29) acres.

36. That said defendant Mary Z. McCrillis is the own-
37 er of the following described tract of land, to-wit:

A tract of land in the southeast quarter (SE¼) of the northeast quarter (NE¼) of Section two (2), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the east one-quarter (¼) corner of Section two (2), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., marked by pipe number niney-five (95); thence north fifty-nine (59) degrees and thirty-four (34) minutes west three hundred eighty-one and five-tenths (381.5) feet to pipe number ninety-six (96); thence north eighteen (18) degrees and thirty-one (31) minutes east one hundred forty-six and four-tenths (146.4) feet to pipe number ninety-seven (97); thence north forty-five degrees and fifty-two minutes (45 d. 52 m.) east four hundred three (403) feet to pipe number ninety-eight (98); thence south twelve (12) minutes east six hundred twenty and six-tenths (620.6) feet on section line between Sections one (1) and two (2), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., to the point of beginning as above described. Containing two and sixty-four hundredths (2.64) acres.

37. That said defendant Frank Edwards is the owner of the following described two tracts of land, to-wit:

A tract of land in the southwest quarter (SW¼) of the northeast quarter (NE¼) of Section one (1), Township nineteen (19) south of Range twenty-six (26), New Mexico Principal Meridian, described as follows:

Beginning at the southeast corner of the southwest quarter (SW¼) of the northeast quarter (NE¼) of Section one (1), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence north eighty-nine (89) degrees and forty-eight (48) minutes west twelve hundred forty-two and two-tenths (1242.2) feet on subdivision line to pipe number eighty-four (84); thence north thirty-two (32) degrees and thirty-three (33) minutes west one hundred sixty-six and [eigth-tenths] (166.8) feet to pipe number eighty-five (85); thence north seventeen (17) minutes west eleven hundred eighty-four (1184) feet on subdivision line to the northwest corner of the southwest quarter (SW¼) of the northeast quarter (NE¼) of said Section one (1); thence south eighty-nine (89) degrees and fifty-four minutes east thirteen hundred thirty-one and one-tenth (1331.1) feet on subdivision

line to the northeast corner of the southwest quarter (SW¼) of the northeast quarter (NE¼) of said section; thence south twenty (20) minutes east thirteen hundred twenty-five and two-tenths (1325.2) feet on subdivision line to the point of beginning as above described. Containing thirty-nine and eighty-six hundredths (39.86) acres.

A tract of land in the southeast quarter (SE¼) of the northwest quarter (NW¼) of Section one (1), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southwest corner of the southeast quarter (SE¼) of the northwest quarter (NW¼) of Section one (1), Township nineteen (19) south of Range twenty-six (26)
38 east, N. M. P. M.; thence south eighty-nine (89) degrees and forty-eight (48) minutes east five hundred eighty-three and five-tenths (583.5) feet on subdivision line to pipe number eighty-eight (88); thence north twenty-seven (27) degrees and twenty-eight (28) minutes east seventy-two and five-tenths (72.5) feet to pipe number eighty-seven (87); thence north sixty-four (64) degrees and twenty-six (26) minutes east six hundred forty-four and eight-tenths (644.8) feet to pipe number eighty-six (86); thence south thirty-two (32) degrees and thirty-three (33) minutes east two hundred forty-four and eight-tenths (244.8) feet to pipe number eighty-five (85); thence north seventeen (17) minutes west eleven hundred eigthy-four (1184) feet on subdivision line to the northeast corner of the southeast quarter (SE¼) of the northwest quarter (NW¼) of said Section one (1); thence north eighty-nine (89) degrees and fifty-four (54) minutes west thirteen hundred thirty and nine-tenths (1330.9) feet to the northwest corner of the southeast quarter (SE¼) of the northwest (NW¼) of said Section one (1); thence south fifteen (15) minutes east thirteen hundred twenty-three and two-tenths (1323.2) feet on subdivision line to the point beginning as above described. Containing thirty-six and forty-two hundredths (36.42) acres.

38. That said defendant I. C. Roberts is the owner of the following described two tracts of land, to-wit:

A tract of land described as follows:

The northwest quarter (NW¼) of the northeast quarter (NE¼) of Section one (1), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, it being also a fractional lot in said section, containing forty and twenty-nine hundredths (40.29) acres.

A tract of land in the northeast quarter (NE¼) of the northwest quarter (NW¼) of Section one (1), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the north one-quarter (¼) corner of Section one (1), Township nineteen (19) south, Range twenty-six (26) east, N. M. P. M.; thence south seventeen (17) minutes east thirteen hundred seventeen and four-tenths (1317.4) feet on subdivision line to the southeast corner of the northeast quarter (NE¼) of the northwest quarter (NW¼) of said section; thence north eighty-nine (89) degrees and fifty-four (54) minutes west thirteen hundred thirty and nine-tenths (1330.9) feet to the southwest corner of the northeast quarter (NE¼) of the northwest quarter (NW¼) of said section; thence north fifteen (15) minutes west two hundred three and six-tenths (203.6) feet on subdivision line to pipe number one hundred (100); thence north fifty-eight (58) degrees and (9) minutes east one hundred forty-nine (149) feet to pipe number one hundred and one (101); thence north twenty-four (24) degrees and thirteen (13) minutes east seven hundred thirty-six and five-tenths (736.5) feet to pipe number one hundred two (102); thence north eleven (11) degrees and twenty-one (21) minutes west three hundred sixty-seven (367) feet to pipe number one hundred three (103); thence east nine hundred sixty-nine and two-tenths (969.2) feet on section line between Section thirty-six (36), Township eighteen (18) south of Range twenty-six (26) east, N. M. P. M., and Section one (1), Township nineteen (19) south, Range twenty-six (26) east, N. M. P. M., to the point of be-
39 ginning as above described. Containing thirty-two and fifty-one hundredths (32.51) acres.

39. That said defendant J. G. Detling is the owner of the following described tract of land, to-wit:

A tract of land in the northwest quarter (NW¼) of the southeast quarter (SE¼) of Section six (6), Township nineteen (19) south of Range twenty-seven (27) east, New Mexico Principal Meridian, described as follows:

Beginning at a point from which the center of Section six (6), Township nineteen (19) south, Range twenty-seven (27) east, N. M. P. M., bears west five hundred three (503) feet distant, and marked by pipe number one hundred two (102); thence south fifty-seven (57) degrees and seventeen (17) minutes east eight hundred eighty-nine (889.5) and five-tenths feet; thence north thirteen (13) degrees and twenty (20)

minutes west four hundred ninety-four and one-tenth (494.1) feet to pipe number one hundred four (104); thence west six hundred thirty-four and five-tenths (634.5) feet on subdivision line to the point of beginning as above described. Containing one and seventy-six hundredths (1.76) acres.

40. That said defendant G. H. Scripps is the owner of the following described three tracts of land:

A tract of land in the southeast quarter (SE¼) of the southeast quarter (SE¼) of Section twenty-five (25), Township eighteen (18) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the northeast corner of the southeast quarter (SE¼) of the southeast quarter (SE¼) of Section twenty-five (25), Township eighteen (18) south of Range twenty-six (26) east, N. M. P. M.; thence south two (2) minutes east seven hundred eleven and two-tenths (711.2) feet on section line between Section thirty (30), Township eighteen (18) south of Range twenty-seven (27) east, N. M. P. M., and Section twenty-five (25), Township eighteen (18) south of Range twenty-six (26) east, N. M. P. M., to pipe number one hundred seventeen (117); thence south eighty-one (81) degrees and fifty-two (52) minutes west thirteen hundred forty-two and one-tenth (1342.1) feet to pipe number one hundred eighteen (118); thence north one (1) minute east four hundred eighty-three and seven-tenths (483.7) feet on subdivision line to pipe number one hundred twenty (120); thence north sixty-four (64) degrees and fifty-five (55) minutes east nine hundred eighty-one and two-tenths (981.2) feet to pipe number one hundred twenty-one (121); thence north eighty-nine (89) degrees and fifty-two (52) minutes east four hundred thirty-eight and seven-tenths (438.7) feet on subdivision line to the point of beginning as above described. Containing nineteen and ninety-three hundredths (19.93) acres.

A tract of land in the southwest quarter (SW¼) of the southeast quarter (SE¼) of Section twenty-five (25), Township eighteen (18) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

40 Beginning at a point marked by pipe number one hundred eighteen (118) which bears north one (1) minute east four hundred fifteen and one-tenth (415.1) feet distant from the southeast corner of the southwest quarter (SW¼) of the southeast quarter (SE¼) of Section twenty-five (25), Township eighteen (18) south of Range twenty-six (26) east; thence north forty-nine (49) degrees and fifty-eight (58)

minutes west four hundred three and two-thirds (403.2) feet to pipe number one hundred nineteen (119); thence north fifty-four (54) degrees and four (4) minutes east three hundred eighty-two and two-tenths (382.2) feet to pipe number one hundred twenty (120); thence south one (1) minute west four hundred eighty-three and seven-tenths feet (483-7) on subdivision line to the point of beginning as above described. Containing one and sixty-seven hundredths (1.67) acres.

A tract of land in the northeast quarter (NE¼) of the southeast quarter (SE¼) of Section twenty-five (25), Township eighteen (18) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southeast corner of the northeast quarter (NE¼) of the southeast quarter (SE¼) of Section twenty-five (25), Township eighteen (18) south of Range twenty-six (26) east, N. M. P. M.; thence south eighty-nine (89) degrees and fifty-two (52) minutes west four hundred thirty-eight and seven-tenths (438.7) feet on subdivision line to pipe number one hundred twenty-one (121); thence north fifty-two (52) degrees and nine (9) minutes east five hundred fifty-five and six-tenths (555.6) feet to pipe number one hundred twenty-two (122); thence south two (2) minutes east three hundred forty and eight-tenths (340.8) feet on section line between Section thirty (30), Township eighteen (18) south of Range twenty-seven (27) east, N. M. P. M., and Section twenty-five (25), Township eighteen (18) south, Range twenty-six (26) east, N. M. P. M., to the point of beginning as above described. Containing one and seventy-two hundredths (1.72) acres.

41. That the said defendants E. F. Hardwick and J. C. Minga are the owners of or claim an interest in the following described three tracts of land, to-wit:

A tract of land described as follows:

The southwest quarter (SW¼) of the southwest quarter (SW¼) of Section thirty (30), Township eighteen [(19)] south of Range Twenty-seven (27) east, New Mexico Principal Meridian, it being also fractional lot number four (4), containing forty and nine hundredths (40.09) acres.

A tract of land in the northwest quarter (NW¼) of the southwest quarter (SW¼) of Section thirty (30), Township eighteen (18) south, Range twenty-seven (27) east, New Mexico Principal Meridian, (also described as Lot number three (3) of said section), described as follows;

Beginning at the southwest corner of the northwest quarter (NW¼) of the southwest quarter (SW¼) of Section thirty (30), Township eighteen (18) south of Range twenty-seven (27) east, N. M. P. M.; thence north two (2) minutes
41 west eight hundred two and three-tenths (802.3) feet on section line between Section twenty-five (25), Township eighteen (18) south of Range twenty-six (26) east, N. M. P. M., and section thirty (30), Township eighteen (18) south of Range twenty-seven (27) east, N. M. P. M., to pipe number one hundred twenty-three (123); thence north sixty-four (64) degrees and fifty-nine (59) minutes east twelve hundred thirty-two and six-tenths (1232.6) feet to pipe number one hundred twenty-four (124); thence south eighty-nine (89) degrees and fifty (50) minutes east on subdivision line two hundred two and three-tenths (202.3) feet to the northeast corner of the northwest quarter (NW¼) of the southwest quarter (SW¼) of said Section thirty (30); thence south one (1) minute west thirteen hundred twenty-four and one-tenth (1324.1) feet on subdivision line to the southeast corner of the northwest quarter (NW¼) of the southwest quarter (SW¼) of said Section thirty (30); thence north eighty-nine (89) degrees and fifty-three (53) minutes west thirteen hundred eighteen and three-tenths (1318.3) feet on subdivision line to the point of beginning as above described. Containing thirty-three and forty-two hundredths (33.42) acres.

A tract of land in the southwest quarter (SW¼) of the northwest quarter (NW¼) of Section thirty (30), (also described as lot number two (2) of said section), Township eighteen (18) south of Range twenty-seven (27) east, New Mexico Principal Meridian, described as follows:

Beginning at the southeast corner of the southwest quarter (SW¼) of the northwest quarter (NW¼) of Section thirty (30), Township eighteen (18) south of Range twenty-seven (27) east, N. M. P. M.; thence north eighty-nine (89) degrees and fifty (50) minutes west two hundred two and three-tenths (202.3) feet on subdivision line to pipe number one hundred twenty-four (124); thence north forty-four (44) degrees and forty-seven (47) minutes east two hundred eighty-seven (287) feet to pipe number one hundred twenty-five (125); thence south one (1) minute west two hundred four (204) feet on subdivision line to the point of beginning as above described. Containing twenty-four hundredths (.24) acres.

That plaintiff has attempted to purchase said three tracts last above described from said E. F. Hardwick but has been

unable to do so as plaintiff and said defendant Hardwick cannot agree upon the proper compensation to be paid therefor.

42. That said defendant Mrs. Marshall K. Holt is the owner of the following described tract of land, to-wit:

A tract of land in the southeast quarter (SE¼) of the northwest quarter (NW¼) of Section thirty (30), Township eighteen (18) south of Range twenty-seven (27) east, New Mexico Principal Meridian, described as follows:

Beginning at the center of Section thirty (30), Township eighteen (18) south of Range twenty-seven (27) east, N. M. P. M.; thence north eighty-nine (89) degrees and fifty (50) minutes west thirteen hundred eighteen and nine-tenths (1318.9) feet to the southwest corner of the southeast quarter (SE¼) of the northwest quarter (NW¼) of said section; thence north one (1) minute east two hundred four (204) feet on subdivision line to pipe number one hundred twenty-five (125); thence north forty-four (44) degrees and
42 forty-seven (47) minutes east seventy-nine and seven-tenths (79.7) feet to pipe number one hundred twenty-six (126); thence north sixty-one (61) degrees and forty-eight (48) minutes east five hundred fifty-three (553) feet to pipe number one hundred twenty-seven (127); thence south eighty-nine (89) degrees and fifty (50) minutes east seven hundred and seventy-six and five-tenths (776.5) feet to pipe number one hundred twenty-eight (128); thence south five hundred twenty-two (522) feet on subdivision line to point of beginning as above described. Containing thirteen and eighty-nine (13.89) hundredths acres.

Wherefore, Plaintiff prays that this court may appoint three disinterested freeholders of the County of Eddy as Commissioners to assess the damages which the defendants herein, and each of them, have sustained in consequence of the taking and appropriation by plaintiff of all and singular the several tracts of land and real estate hereinbefore described, and that upon the payment by plaintiff to the clerk of this court for the use and benefit of said defendants, or any or either of them, of the amount of damages thus assessed and of the costs of this proceeding properly payable by plaintiff, the said tracts of land and real estate and all of them hereinbefore described may be adjudged and decreed by this court to be the property of plaintiff herein from the date of the said taking or the appropriation thereof by said plaintiff as aforesaid, to be held by it in fee simple for the uses

and purposes above set forth. Plaintiff further prays that its estate and title be established to each and all of the tracts of land herein described against the claims of each and all of the defendants herein, and that each and all of said defendants herein be barred and forever estopped from having or claiming any right or title to the premises, or any part thereof, adverse to plaintiff, and that plaintiff's title thereto be forever quieted and set at rest; and for such other and further relief as to the court may seem meet and proper in the premises.

S. BURKHART,
United States Attorney for the
District of New Mexico.

State of New Mexico,
County of Bernalillo,—ss.

P. W. Dent, being first duly sworn, on his oath deposes and says that he is District Counsel in the Reclamation Service of the United States of America and makes this affidavit for and on behalf of said United States; that he has heard read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to the matters and things therein alleged upon information and belief and as to those matters and things, he verily believes them to be true.

P. W. DENT.

Subscribed and sworn to before me this 13th day of January, 1915.

GEO. C. TAYLOR,
Notary Public.

My commission expires Mch. 10, 1918.

---

43 (Order, July 27, 1917, directing Plaintiff to deposit with the Clerk of the District Court the sum of $6,557.06 for the use and benefit of certain Defendants, etc.)

Filed in the U. S. District Court, July 27, 1917.

The above entitled cause having heretofore come on for hearing upon the exceptions filed by plaintiff and certain of the defendants to the report of the Commissioners filed herein on February 3, 1917, and all of said exceptions, so far as they relate to the damages sustained by the defendants by the taking of the lands described in plaintiff's petition being overruled, save the exceptions filed to the awards made in favor of defendants Arthur A. Kaiser and Messrs. Crozier &

Humphreys, and the awards in favor of each of said defendants as to the lands described in plaintiff's petition being approved and confirmed, with the exceptions stated.

And it appearing to the court that the defendants hereinafter mentioned have not appealed from the awards of damages made in said report and the confirmation thereof by the court, as provided by law; and it further appearing that the appeal heretofore taken by plaintiff and cross appeal
44 by defendants in connection with the award to defendants H. L. Wilson and V. B. Short having been dismissed.

It is ordered, adjudged and decreed that the plaintiff deposit with the clerk of this court the aggregate sum of $6557.06 for the use and benefit of the several defendants hereinafter named, on account of the taking and appropriation by plaintiff of the tracts of land and property hereinafter described, and in accordance with the awards of the commissioners in said report set forth. The names of the defendants for whose use and benefit said several amounts are to be deposited, the tracts of land on account of which damages are awarded, and the amount of the damages awarded to each are, as follows:

Name of Defendant:—William E. Rogers.

1. Damages by taking and appropriation of the lands described in plaintiff's petition.

(a) Description of Land.

A tract of land in the northwest quarter (NW¼) of the southwest quarter (SW¼) of Section one (1), Township (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the west one-quarter (¼) corner of Section one (1), Township nineteen (19) south of Range twenty-six (26) east N. M. P. M.; thence south eighty-nine (89) and forty-eight (48) minutes east thirteen hundred thirty-one and eight-tenths (1331.8) feet on subdivision line to the northeast corner of the northwest quarter (NW¼) of the southwest quarter (SW¼) of said section; thence south fifteen (15) minutes east eight hundred fifty-six and one-tenth (856.1) feet on subdivision line to pipe number ninety-one (91); thence south sixty-four (64) degrees and thirty-two (32) minutes west sixty-five and three-tenths (65.3) feet to pipe number ninety-

two (92); thence south seventy-two (72) degrees and
45 twenty-two (22) minutes west seven hundred sixty-four and six-tenths (764.6) feet to pipe number ninety-three (93); thence north twelve (12) degrees and twenty-five (25) minutes west nine hundred thirty-two (932) feet to pipe number ninety-four (94); thence north fifty-eight (58) degrees and sixteen (16) minutes west four hundred six and six-tenths (406.6) feet, to the point of beginning as above described. Containing twenty-one and sixteen hundredths (21.16) acres.

A tract of land in the southwest quarter (SW¼) of the northwest quarter (NW¼) of Section one (1), Township nineteen (19) south of Range twenty-six (26) New Mexico Principal Meridian, described as follows:

Beginning at the west one-quarter (¼) corner of Section one (1), Township nineteen (19) south of Range twenty-six (26) east N. M. P. M.; thence north twelve (12) minutes west six hundred twenty and six-tenths (620.6) feet on section line between Sections one (1) and two (2), Township nineteen (19) south of Range twenty-six (26) east N. M. P. M. to pipe number ninety-eight; thence north fifty-four degrees and thirty-four (34) minutes east twelve hundred eight and five-tenths (1208.5) feet to pipe number ninety-nine (99); thence south eighty-nine (89) degrees and fifty-four (54) minutes east three hundred forty-three and seven-tenths (343.7) feet on subdivision line to the northeast corner of the southwest quarter (SW¼) of the northwest quarter (NW¼) of said Section one (1); thence north eighty-nine (89) degrees and forty-eight (48) minutes west thirteen hundred thirty-one and eight-tenths (1331.8) feet on subdivision line to the point of beginning as above described, Containing thirty-two and five-hundredths (32.05) acres.

A tract of land in the northwest quarter (NW¼) of the Northwest quarter (NW¼) of Section one (1), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian described as follows:

Beginning at the southeast corner of the northwest
46 quarter (NW¼) of the northwest quarter (NW¼) of Section one (1); thence south fifteen (15) minutes east thirteen hundred twenty-three and two-tenths (1323.2) feet on subdivision line to the southeast corner of the southwest quarter (SW¼) of the northwest quarter (NW¼) of said section one (1), Township nineteen (19) south, Range twenty-six (26) east, N. M. P. M.; thence north eighty-nine (89) de-

grees and fifty-four (54) minutes west three hundred forty-three and [seventh-tenths] (343.7) feet on subdivision line to pipe number ninety-nine (99); thence north fifty-nine (59) degrees and thirty-one (31) minutes east three hundred and ninety-eight and one-tenth (398.1) feet to pipe number one hundred (100); thence south fifteen (15) minutes east two hundred three and six-tenths (203.6) feet on subdivision line to the point of beginning as above described. Containing eighty-hundredths (.80) acres.

(b) Area.....54.01 acres

(c) Amount of damages.....$1512.00

Names of Defendants:—V. B. Short and H. L. Wilson, as their interests may be determined.

1. Damages by taking and appropriation of the lands described in plaintiff's petition.

(a) Description of land.

A tract of land in the southwest quarter (SW¼) of the southeast quarter (SE¼) of Section thirty-four (34), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the south one-quarter (¼) corner of Section thirty-four (34), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south eighty-nine (89) degrees and fifty-four (54) minutes east thirteen hundred twenty-five (1325) feet to the southwest corner of the southeast quarter (SE¼) of the southeast quarter (SE¼) of said section; thence north twenty-four minutes (24) east one hundred fifty-six and nine-tenths (156.9) feet to intersection with the west embankment of Lake McMillan;
47 thence north thirty-five (35) degrees and two (2) minutes west twelve hundred sixty-eight and four-tenths (1268.4) feet along center line of said embankment; thence north forty-six (46) degrees and thirty-four (34) minutes east one hundred eighty-two and five tenths (182.5) feet to intersection with subdivision line marked by pipe number thirteen (13); thence north eighty-nine degrees (89) and fifty-four (54) minutes west seven hundred ten (710) feet to the northwest corner of the southwest quarter (SW¼) of the southeast quarter (SE¼) of said section; thence south twenty-four (24) minutes east thirteen hundred fourteen and six-tenths (1314.6) feet to point of beginning as above de-

scribed. Containing twenty-seven and forty-nine hundredths (27.49) acres.

A tract of land in the northwest quarter (NW¼) of the southeast quarter (SE¼) of Section thirty-four (34), Township nineteen (19) south of Range twenty-six east, New Mexico Principal Meridian, described as follows:

Beginning at the southwest corner of the northwest quarter (NW¼) of the southeast quarter (SE¼) of Section thirty-four (34), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south eighty-nine (89) degrees and fifty-four minutes east seven hundred ten (710) feet along subdivision line to pipe number thirteen (13); thence north forty-six (46) degrees and thirty-four (34) minutes east five hundred seventeen and five-tenths (517.5) feet along flow line of McMillan Reservoir at elevation thirty-two hundred sixty-five and six-tenths (3265.6) feet above mean sea level; thence north seventeen (17) degrees and forty-six minutes (46) east eight hundred (800) feet; thence north three (3) degrees and forty-two (42) minutes west one hundred ninety-seven and three-tenths feet (197.3) to point in subdivision line marked by pipe number sixteen (16); thence north eighty-nine (89) degrees and fifty-four (54) minutes west thirteen hundred eight (1308) feet along subdivision line to the center of said section; thence south twenty-four (24) minutes west thirteen hundred fourteen and six-tenths (1314.6) feet
48 to point of beginning as above described. Containing thirty-two and sixty-four hundredths (32.64 acres.

A tract of land in the southwest quarter (SW¼) of the northeast quarter (NE¼) of Section thirty-four (34), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the center of Section thirty-four (34), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south eighty-nine (89) degrees and fifty-four (54) minutes east thirteen hundred eight (1308) feet along subdivision line to a point in the flow line of McMillan Reservoir at elevation thirty-two hundred sixty-five and six-tenths (3265.6) feet above mean sea level marked by pipe number sixteen (16); thence north three (3) degrees and forty-two (42) minutes west ten hundred two and seven-tenths (1002.7) feet; thence north thirteen (13) degrees and thirty-three (33) minutes east three hundred fourteen and four-tenths (314.4) to point in subdivision line marked by pipe number eighteen (18); thence north eighty-nine (89) degrees and fifty-four

(54) minutes west seven hundred ninety-five and nine-tenths (795.9) feet along subdivison line to point in flow line of McMillan Reservoir at elevation thirty-two hundred seventy-two and six-tenths (3272.6) feet above mean sea level marked by pipe number six (6); thence south thirty-three (33) degrees and thirty-five (35) minutes west nine hundred forty-four and three tenths (944.3) feet to point in subdivision line marked by pipe number five (5); thence south twenty-four (24) minutes west five hundred twenty-four and five-tenths (524.5) feet to point of beginning as above described. Containing thirty-two and fifteen-hundreths (32.15) acres.

(b) Area.....92.28 acres.

(c) Amount of damages.....$3563.00.

---

49 Name of Defendants: S. F. Miles.

1. Damages by taking and an appropriation of the lands described in plaintiff's petition.

(a) Description of land.

A tract of land in the northeast quarter of the southeast quarter ($NE\frac{1}{4}SE\frac{1}{4}$) of Section twenty-seven (27), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southeast corner of the northeast quarter ($NE\frac{1}{4}$) of the southeast quarter ($SE\frac{1}{4}$) of Section twenty-seven (27) Township nineteen (19) south of Range twenty-six (26) east N. M. P. M.; thence north twenty-eight (28) minutes east four hundred fifty-two and seven-tenths (452.7) feet along Section line to pipe number twenty-seven (27); thence north twenty (20) degrees and twenty (20) minutes west two hundred seventy-three and eight-tenths (273.8) feet; thence north forty (40) degrees and fifty-two (52) minutes east one hundred fifty (150) feet to pipe number twenty-nine (29); thence north twenty-eight minutes (28) east four hundred ninety-five (495) feet along section line to the east one-quarter ($\frac{1}{4}$) corner of said Section twenty-seven (27); thence north eighty-nine (89) degrees and fifty-seven minutes (57) west three hundred thirty-five (335) feet along subdivision line to pipe number twelve (12); thence south twenty-eight (28) degrees and thirty-one (31) minutes west fourteen hundred ninety-eight and three-tenths (1498.3) feet to pipe number eleven (11); thence south eighty-nine (89) degrees and fifty-five (55) minutes east ten hundred thirty-eight and nine-

tenths (1038.9) feet to point of beginning as above described. Containing nineteen and seventy-five hundredths (19.75) acres.

(b) Area .....19.75 acres

(c) Amount of damages.....$553.00

---

50 Name of Defendant: GEORGE N. UPHAM.

1. Damages by taking and appropriation of the lands described in plaintiff's petition.

(a) Description of land.

A tract of land in the south twelve (12) acres of the southeast quarter (SE¼) of the northeast quarter (NE¼) of Section twenty-seven (27), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the east one quarter (¼) corner of Section twenty-seven (27), Township nineteen (19) south of range twenty-six (26) east, N. M. P. M.; thence north eighty-nine (89) degrees and fifty-seven (57) minutes west three hundred thirty-five (335) feet on subdivision line to pipe number twelve (12); thence north twelve (12) degrees and twenty-nine (29) minutes west four hundred five and three-tenths (405.3) feet to pipe number thirteen (13); thence south eighty-nine (89) degrees and fifty-six (56) minutes east four hundred twenty-two and six-tenths (422.6) feet on property line; thence south twenty-eight (28) minutes west three hundred ninety-five and seven-tenths (395.7) feet on section line to the point of beginning as above described. Containing three and forty-four hundredths (3.44) acres.

(b) Area .....3.44 acres.

(c) Amount of damages.....$68.88

Name of Defendants: BRYANT BANTA and J. C. MINGS (Minga), as their interest may be determined.

1. Damages by taking and appropriation of the lands described in plaintiff's petition.

(a) Description of land.

A tract of land in the north twenty-eight (28) acres of the southeast quarter (SE¼) of the northeast quarter (NE¼) of

Section twenty-seven (27), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

51 Beginning at a point on section line between Sections twenty-six (26) and twenty-seven (27) in Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., which bears north twenty-eight (28) minutes east three hundred ninety-five and seven-tenths (395.7) feet distant from the east one-quarter (¼) corner of Section twenty-seven (27), Township nineteen (19) south of Range twenty-six (26) east, marked by a stone; thence north eighty-nine (89) degrees and fifty-six (56) minutes west four hundred twenty-two and six-tenths (422.6) feet on property line to pipe number thirteen (13); thence north twenty-nine (29) degrees east three hundred sixty-four and three-tenths (364.3) feet to pipe number fourteen (14); thence north sixty-eight (68) degrees and thirty-one (31) minutes east two hundred seventy-one and eight-tenths (271.8) feet to point on section line between sections twenty-six (26) and twenty-seven (27) in Township nineteen (19) south of Range twenty-six (26) east, marked by pipe number fifteen (15); thence south twenty-eight (28) minutes west four hundred nineteen and five-tenths (419.5) feet to point of beginning as above described. Containing two and seventy-nine hundredths acres (2.79).

(b) Area ..... 2.79 acres.

(c) Amout of damages..... $195.30

Name of Defendant: HENRY ZAJIC.

1. Damages by the taking and appropriation of lands described in plaintiff's petition.

(a) Description of land.

A tract of land in the southeast quarter (SE¼) of the northwest quarter (NW¼) of section thirteen (13) Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

52 Beginning at the center of section thirteen (13), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M.; thence south eighty-nine degrees (89) and fifty-nine (59) minutes west three hundred thirty-five and one-tenth (335.1) feet on subdivision line to pipe number forty-nine (49); thence north fifty-four (54) degrees and forty-one

(41) minutes east four hundred ten and three-tenths (410.3) feet to pipe number fifty (50); thence south fourteen (14) minutes east two hundred thirty-two and two-tenths (232.2) feet on subdivision line to the point of beginning as above described. Containing ninety-five hundredths (.95) acres.

(b) Area ..... .95 acres.

(c) Amount of damages .....$35.00.

Name of Defendant: CURTIS V. YOH.

1. Damages by the taking and appropriation of lands described in plaintiff's petition.

(a) Description of land.

A tract of land in the southwest quarter (SW¼) of the southeast quarter (SE¼) of Section seven (7) Township nineteen (19) south of Range twenty-seven (27) east, New Mexico Principal Meridian, described as follows:

Beginning at the northwest corner of the southwest quarter (SW¼) of the southeast quarter (SE¼) of Section seven (7), Township nineteen (19) south of Range twenty-seven (27) east, N. M. P. M.; thence south twenty-seven (27) minutes east eight hundred ninety-two and one-tenth (892.1) feet on subdivision line to pipe number seventy-five (75); thence north fifty-four (54) degrees and fifty- (50) minutes east eight hundred fifty-seven and seven-tenths (857.7) feet; thence north twenty-eight (28) degrees and twenty-five (25) minutes east four hundred fifty-one and five-tenths (451.5) feet to pipe number seventy-eight (78); thence west
53 four hundred ninety-three and four-tenths (493.4) feet on subdivision line to the point of beginning as above described. Containing seven and sixty-nine hundredths (7.69) acres.

A tract of land in the northwest quarter (NW¼) of the southeast quarter (SE¼) section seven (7), Township nineteen (19) south of Range twenty-seven (27) east, New Mexico Principal Meridian, described as follows:

Beginning at the southwest corner of the northwest quarter of the southeast quarter of Section seven (7), Township nineteen (19) south of Range twenty-seven (27) east, N. M. P. M.; thence east four hundred ninety-three and four-tenths (493.4) feet on subdivision line to pipe number seventy-eight (78); thence north twenty-eight (28) degrees and twenty-five (25) minutes west five hundred forty-eight and five-tenths (548.5)

feet; thence north seventy-five (75) degrees and fifty-nine (59) minutes west two hundred forty-four and nine-tenths (244.9) feet to pipe number eighty- (80); thence south twenty-seven (27) minutes east five hundred forty-one and seven-tenths (541.7) feet on subdivision line to the point of beginning as above described. Containing three and two-hundredths (3.02) acres.

(b) Area .....10.71 acres.

(c) Amount of damages.....$299.88

Name of Defendant: MARY Z. MCCRILLIS.

1. Damages by the taking and appropriation of lands described in plaintiff's petition.

(a) Description of land.

A tract of land in the southeast quarter (SE¼) of the norfheast quarter (NE¼) of Section two (2), Township nineteen (19) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

54 Beginning at the east one-quarter (¼) corner of Section two (2), Township nineteen (19) south, of Range twenty-six (26) east, N. M. P. M., marked by pipe number ninety-five (95); thence north fifty-nine (59) degrees and thirty-four (34) minutes west three hundred eighty-one and five-tenths (381.5) feet to pipe number ninety-six (96); thence north eighteen (18) degrees and thirty-one (31) minutes east one hundred forty-six and four-tenths (146.4) feet to pipe number ninety-seven (97); thence north forty-five degrees and fifty-two minutes (45 d. 52 m.) east four hundred three (403) feet to pipe number ninety-eight (98); thence south twelve (12) minutes east six hundred twenty and six-tenths (620.6) feet on section line between Sections one (1) and two (2), Township nineteen (19) south of Range twenty-six (26) east, N. M. P. M., to the point of beginning as above described. Containing two and sixty-four hundredths (2.64) acres.

(b) Area.....2.64 acres.

(c) Amount of damages.....$79.20.

Name of Defendant:—J. G. DETLING.

1. Damages by the taking and appropriation of lands described in plaintiff's petition.

(a) Description of land.

A tract of land in the northwest quarter (NW¼) of the southeast quarter (SE¼) of Section six (6), Township nineteen (19) south of Range twenty-seven (27) east, New Mexico Principal Meridian, described as follows:

Beginning at a point from which the center of Section six (6), Township nineteen (19) south, Range twenty-seven (27) east, N. M. P. M., bears west five hundred three (503) feet distant, and marked by pipe number one hundred two (102); thence south fifty-seven (57) degrees and seventeen (17) minutes east eight hundred eighty-nine (889.5) and five-tenths feet; thence north thirteen (13) degrees and twenty (20) minutes west four hundred ninety-four and one-tenth (494.1) feet to pipe number one hundred four (104); thence west
55 six hundred thirty-four and five-tenths (634.5) feet on subdivision line to the point of beginning as above described. Containing one and seventy-six hundredths (1.76) acres.

(b) Area .....1.76 acres.

(c) Amount of damages.....$17.60

Name of Defendant:—G. H. SCHRIPPS.

1. Damages by the taking and appropriation of lands described in plaintiff's petition.

(a) Description of land.

A tract of land in the southeast quarter (SE¼) of the southeast quarter (SE¼) of Section twenty-five (25), Township eighteen (18) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the northeast corner of the southeast quarter (SE¼) of the southeast quarter (SE¼) of Section twenty-five (25), Township eighteen (18) south of Range Twenty-six (26) east, N. M. P. M.; thence south two (2) minutes east seven hundred eleven and two-tenths (711.2) feet on section line between Section thirty (30), Township eighteen (18) south of Range twenty-seven (27) east, N. M. P. M., and Section twenty-five (25), Township eighteen (18) south of Range

twenty-six (26) east, N. M. P. M., to pipe number one hundred seventeen (117); thence south eighty-one (81) degrees and fifty-two (52) minutes west thirteen hundred forty-two and one-tenth (1342.1) feet to pipe number one hundred eighteen (118); thence north one (1) minute east four hundred eighty-three and seven-tenths (483.7) feet on subdivision line to pipe number one hundred twenty (120); thence north sixty-four (64) degrees and fifty-five (55) minutes east nine hundred eighty-one and two-tenths (981.2) feet to pipe number one hundred twenty-one (121); thence north eighty-nine (89) degrees and fifty-two (52) minutes east four hundred thirty-eight and seven-tenths (438.7) feet on subdivision line to the point of beginning as above described. Containing nineteen and ninety-three hundredths (19.93) acres.

56 A tract of land in the southwest quarter (SW¼) of the southeast quarter (SE¼) of Section twenty-five (25), Township eighteen (18) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at a point marked by pipe number one hundred eighteen (118) which bears north one (1) minute east four hundred fifteen and one-tenth (415.1) feet distant from the southeast corner of the southwest quarter (SW¼) of the southeast quarter (SE¼) of Section twenty-five (25), Township eighteen (18) south of Range twenty-six (26) east; thence north forty-nine (49) degrees and fifty-eight (58) minutes west four hundred three and two-tenths (403.2) feet to pipe number one hundred nineteen (119); thence north fifty-four (54) degrees and four (4) minutes east three hundred eighty-two and two-tenths (382.2) feet to pipe number one hundred twenty (120); thence south one (1) minute west four hundred eighty-three and seven-tenths (483.7) feet on subdivision line to the point of beginning as above described. Containing one and sixty-seven hundredths (1.67) acres.

A tract of land in the northeast (NE¼) quarter of the southeast quarter (SE¼) of Section twenty-five (25), Township eighteen (18) south of Range twenty-six (26) east, New Mexico Principal Meridian, described as follows:

Beginning at the southeast corner of the northeast quarter (NE¼) of the southeast quarter (SE¼) of Section twenty-five (25), Township eighteen (18) south of Range twenty-six (26) east, N. M. P. M.; thence south eighty-nine (89) degrees and fifty-two (52) minutes west four hundred thirty-eight and seven-tenths (438.7) feet on subdivision line to pipe num-

ber one hundred and twenty-one (121); thence north fifty-two (52) degrees and nine (9) minutes east five hundred fifty-five and six-tenths (555.6) feet to pipe number one hundred twenty-two (122); thence south two (2) minutes east three hundred forty and eight-tenths (340.8) feet on section line between Section thirty (30), Township eighteen (18) south of Range twenty-seven (27) east, N. M. P. M., and Sec-
57 tion twenty-five (25), Township eighteen (18) south, Range Twenty-six (26) east, N. M. P. M., to the point of beginning as above described. Containing one and seventy-two hundredths (1.72) acres.

(b) Area .....23.32 acres.

(c) Amount of damages.....$233.20.

It is further ordered, adjudged and decreed, that upon the deposit by plaintiff with the clerk of this court, of the amounts awarded to the several defendants, as hereinbefore set forth, the United States of America shall be let into the possession of all and singular, the premises described, to have and to hold the same for the uses and purposes set forth in the petition herein filed.

It is further ordered, adjudged and decreed that the clerk of this court, after the deposit with him of the said several sums of money awarded to the said defendants, as herein provided, pay over to the said defendants, the sums of money so awarded to them by issuing checks therefor in the names of the respective defendants, and by delivering said checks to their rsepective attorneys of record, taking the receipts of said attorneys of record for said checks, and where defendants are not represented b yattorneys of record, that said checks be delivered b ythe clerk to therespective defendants in person or by mail.

Jurisdiction is hereby retained for such further orders and judgments as may be hereafter necessary as to any defendants whose claims are not dealt with hereby.

Done at Sante Fe, New Mexico, this 27th day of July, A. D. 1917.

COLIN NEBLETT Judge.

58 (Motion for Supplemental Order, requiring Plaintiff to deposit with the Clerk of the District Court, a sum equal to 6% Interest on the principal sum of $6,557.06, from April 19, 1912, until the date of deposit of such principal sum, etc.)

Come now Messrs. Reid & Hervey and George S. Downer, attorneys of record for various defendants in the above entitled cause, and respectively move the court to enter an order herein supplemental to its order of July 27th, 1917, requiring plaintiff to deposit with the Clerk of this court a sum equal to 6 per cent interest on the sum of $6,557.06, from April 19, 1912, until the date of such deposit, for the use and benefit of the several defendants named in such order on account of the taking and appropriation by plaintiff of the tracts of land and property described in such order, all in accordance with the award of the Commissioners appointed by the court, and as grounds for such motion, represent to the court:

1. That in Paragraph 3-¾ of plaintiff's petition in this cause, the following allegation appears:

"That for the purpose of carrying out the provisions of said Acts of Congress of June 17, 1902, and the other acts of Congress amendatory thereof and supplementary thereto, hereinbefore referred to, and in order to provide for
59 the storage of additional water to be impounded by said additional works, and for other necessary purposes connected with said project, it became necessary, and the Secretary of the Interior determined that it was necessary to acquire certain lands and real estate of the said defendants situated in the County of Eddy and State of New Mexico, and at the date of the completion of said additional works, to-wit, April 19, 1912, the said lands of said defendants hereinafter described were flooded and thereby appropriated by the Government of the United States under authority of the said acts of Congress aforesaid for said necessary purposes, but no compensation therefor has been up to this time paid for the said lands so appropriated as aforesaid by the Secretary of the Interior;"

2. That said allegation in plaintiff's petition above quoted was admitted by all parties to this action, and same should, therefore, be considered as a fact;

3. That the Commissioners heretofore appointed by the court, in making their report and in fixing the award for damages to the various defendants for lands appropriated

and described in plaintiff's petition, considered same in accordance with the valuation of the various lands on April 19, 1912, and added no interest to such awards by reason of the time intervening between the date of the taking and the date of their report, the language employed in said report of the Commissioners being as follows:

"This Commission finds, from the statements of counsel representing both the plaintiff and defendants, and reports to the court, that the damages by sub-irrigation and damages by reason of the taking alleged in plaintiff's petition occurred on the 19th day of April 1912, and that the damages by submersion of the lands to the east and south of the so-called P. I. & I. countour line [occured] approximately on the 1st day of August 1910, and this Commission, in fixing their
60 award and assessment hereinafter set forth, computed the same as of these dates, and no interest has been added thereto for the time intervening between the date of such taking and such damage, and the date of the filing of plaintiff's petition, or the date of this report."

4. That the order of the court of July 1917, was entered without any hearing in the premises, and the above named counsel were not present or in court at the time, and the failure of the court to include in such order a direction that the amounts ordered to be paid in should include interest, and the failure of such order to so include the interest charge was but recently discovered by counsel.

REID & HERVEY
GEORGE S. DOWNER
Attorneys for various defendants.

Albuquerque and Roswell, N. M.

---

61 (Supplemental Order, October 1, 1917, requiring Plaintiff to deposit with the Clerk of the District Court, a sum equal to 6% Interest on the principal sum of $6,557.06, from April 19, 1912 until the date of the deposit of such principal sum, etc.)

Filed in the U. S. District Court, October 1, 1917.

The above matter coming on to be heard upon the motion of Messrs. Reid & Hervey and George S. Downer, attorneys of record for various defendants in the above entitled cause, for an order supplemental to the court's order of July 1917,

requiring plaintiff to pay into court the sum of $6,557.06, and both parties being represented in open court by counsel, after hearing the argument of counsel and being fully advised as to the facts and law in the premises,

It Is Ordered, Adjudged and Decreed by the court that plaintiff, the United States, be, and it hereby is, ordered and required to deposit with the Clerk of the court a sum equal to 6 per cent interest on the principal sum of $6,557.06 from April 19, 1912, until the date of the deposit of such principal sum, for the use and benefit of the several defendants named in the order of this court of July, on account of the taking and appropriation by plaintiff of the tracts of land and property described in such order, all in accordance with the award of the Commissioners appointed by the court.

To which order and decree, plaintiff, by its attorney, duly excepts.

Done at Santa Fe, N. M., this 1st day of October, A. D. 1917.

COLIN NEBLETT, Judge.

---

62 (Petition for Writ of Error.)

Filed in the U. S. District Court, March 29, 1918.

To the Honorable Colin Neblett, District Judge:

The above named petitioner, the United States of America, feeling aggrieved by the judgment entered in the above entitled cause on the 1st day of October A. D., 1917, awarding William E. Rogers, V. B. Short, H. L. Wilson, S. F. Miles, George N. Upham, Bryan Banta, J. C. Mings (Minga), Henry Zajic, Curtis V. Yoh, Mary Z. McCrillis, J. G. Detling, and G. H. Scripps interest at 6 per cent per annum from April 19, 1912, to date of deposit in court on the amounts awarded said parties by the judgment entered on July 27, 1917, does hereby apply for a writ of error from the Circuit Court of Appeals for the Eighth Circuit for the reasons set forth in the assignment of errors filed herewith, and prays that the said writ of error may be allowed and that citation issue as provided by law, and that a transcript of the record upon which said judgment was based, duly authenticated, be sent

to the said United States Circuit Court of Appeals, under the rules of said court in such cases made and provided.

S. BURKHART,
United States Attorney.

P. W. DENT,
District Counsel, U. S. Reclamation Service.

---

63 (Assignment of Errors.)

Filed in the U. S. District Court, March 29, 1918.

Now comes the petitioner in the above entitled case and files the following assignment of errors upon which it will rely upon its prosecution of its writ of error in the above entitled cause, to the judgment entered by this court on the 1st day of October, A. D. 1917:

I

That the United States District Court for the District of New Mexico erred in awarding interest against the United States from April 19, 1912, to date of deposit of awards in court, for the reason that interest can not properly be allowed in a condemnation case against the United States for any period prior to date of final judgment.

II

That the United States District Court for the District of New Mexico erred in awarding interest against the United States from April 19, 1912, to date of deposit of awards in court, for the reason that interest can not properly be allowed in a condemnation case against the United States for any period prior to date of order of the court placing the United States in possession of the lands condemned.

III

That the United States District Court for the District of New Mexico erred in awarding interest at the rate of
64 six per cent per annum against the United States from April 19, 1912, to date of deposit of awards in court, for the reason that there is no authority of law for allowing interest at said rate on judgments against the United States.

Wherefore petitioner prays that said judgment or order be reversed and that said District Court for the District of New

Mexico be ordered to enter a decree reversing the decision of the lower court in said cause.

S. BURKHART,
United States Attorney.

P. W. DENT,
District Counsel, U. S. Reclamation Service.
Attorneys for Petitioner.

65

(Order allowing Writ of Error.)

Filed in the U. S. District Court, March 29, 1918.

This 29th day of March, 1918, came the plaintiff, by J. O. Seth, Esq., Assistant United States Attorney, and P. W. Dent, Esq., District Counsel for the U. S. Reclamation Service, and filed herein and presented to the court, its petition praying for the allowance of a writ of error, and assignment of errors intended to be urged by it, praying also, that a transcript of the record, proceedings and papers on which the judgment and order appealed from was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises;

On consideration whereof, the court does allow the writ of error as prayed.

COLIN NEBLETT.
U. S. District Judge.

66

(Praecipe for Transcript.)

Filed in the U. S. District, March 29, 1918.

To the Clerk of the above-named court:

A writ of error having been allowed in the above entitled cause under date of March 29, 1918, plaintiff in error designates the following-named papers as necessary for the consideration of the errors assigned:

1.—Petition of plaintiff:

2.—Order of July 27, 1917:

3.—Motion of defendants, filed September 27, 1917, for supplemental order requiring payment of interest.

4.—Supplemental order of October 1, 1917, directing the deposit of interest.

The Clerk of the Court will therefore send to the United States Circuit Court of Appeals, Eighth Circuit, copies of the above mentioned papers.

S. BURKHART.
U. S. Attorney.
P. W. DENT.
District Counsel, U. S.
Reclamation Service.
Attorneys for plaintiff in error.

---

67 (Clerk's Certificate to Transcript.)

The United States of America,
District of New Mexico—ss.

I, Wyly Parsons, Clerk of the District Court of the United States for the District of New Mexico, do hereby certify that the foregoing transcript, consisting of 66 pages constitutes a full, true and correct copy of the proceedings had and orders entered in the above entitled cause, as set forth therein; as the same appears on file and of record in this office, with the exception of the writ of error and the citation, herewith attached, at pages one and two respectively, which are the original writ and citation.

The foregoing constitutes the entire transcript in said cause, as designated by praecipe duly filed by the plaintiff-in-error, and copy of which appears at page 66 of said transcript.

Witness by hand and the official seal of said court, at Santa Fe, New Mexico, this 22nd day of May, A. D., 1918.

Seal
U. S. Dist Court
Dist. of
New Mexico
1912

WYLY PARSONS
Clerk.

Filed May 25 1918 E. E. Koch Clerk

---

75 And thereafter the following proceedings were had in said cause, in the Circuit Court of Appeals, viz:

(Appearance of Mr. P. W. Dent as counsel for plaintiff in error.)

United States Circuit Court of Appeals, Eighth Circuit.

THE UNITED STATES OF AMERICA, plaintiff in error,
vs.
WILLIAM E. ROGERS et al. } No. 5166.

The clerk will enter my appearance as counsel for the plaintiff in error.

P. W. DENT,
El Paso, Texas.

(Endorsed:) Filed in U. S. Circuit Court of Appeals May 31, 1918.

(Appearance of Mr. S. Burkhart, United States attorney, as counsel for plaintiff in error.)

The clerk will enter my appearance as counsel for the plaintiff in error.

S. BURKHART,
U. S. Atty. for N. M.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jun. 6, 1918.

76 (Appearance of Mr. W. C. Reid and Mr. George S. Downer as counsel for defendants in error.)

The clerk will enter my appearance as counsel for the defendants in error.

J. M. HERVEY,
W. C. REID,
GEORGE S. DOWNER,
Albuquerque, N. M.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 9, 1918.

(Appearance of Mr. J. M. Hervey as counsel for defendants in error.)

The clerk will enter my appearance as counsel for the defendants in error.

J. M. HERVEY.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 11, 1918.

(Appearance of Mr. Earl C. Iden as counsel for defendants in error.)

The clerk will enter my appearance as counsel for the defendants in error.

EARL C. IDEN.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 16, 1918.

77 (Order of submission.)

December term, 1918.

THURSDAY, *December 12, 1918.*

UNITED STATES OF AMERICA, plaintiff in error, *vs.* WILLIAM E. ROGERS et al.	No. 5166. In error to the District Court of the United States for the District of New Mexico.

and

UNITED STATES OF AMERICA, plaintiff in error, *vs.* MARGIE L. HIGHSMITH.	No. 5263. In error to the District Court of the United States for the District of New Mexico.

These causes having been called for hearing this day are, pursuant to stipulation of parties, argued together, and the argument was commenced by Mr. P. W. Dent for plaintiff in error, continued by Mr. J. M. Hervey for defendants in error, and concluded by Mr. P. W. Dent for plaintiff in error.

Thereupon, these causes were submitted to the court on the transcripts of the records from said district court and the briefs of counsel filed herein, and if it is deemed advisable the same will be submitted on the records and briefs to a third judge.

78 (Opinion.)

United States Circuit Court of Appeals, Eighth Circuit.

December term, A. D. 1918.

THE UNITED STATES OF AMERICA, PLAINTIFF in error. *vs.* WILLIAM E. ROGERS ET AL., DEFENDANTS IN in error.	No. 5166. In error to the District Court of the United States for the District of New Mexico.

Mr. P. W. Dent, district counsel, United States Reclamation Service (Mr. S. Burkhart, United States attorney, and Mr. J. O. Seth, assistant United States attorney, were with him on the brief), for plaintiff in error.

Mr. J. M. Hervey (Mr. W. C. Reid and Mr. George S. Downer were with him on the brief), for defendants in error.

Before HOOK, circuit judge, and TRIEBER, district judge.

HOOK, circuit judge, delivered the opinion of the court.

This is a writ of error by the Government to review awards in condemnation proceedings instituted by it in the court below (act of Aug. 1, 1888, 25 stat., 357; reclamation act of July 17, 1902, 32 Stat.,

388). The only questions involved are whether the landowners are entitled to interest as part of the awards, and, if so, from what time and at what rate.

Lands of the defendants in error in New Mexico were appropriated by the Government for public use in a reclamation project. They were actually taken by flooding on April 19, 1912, and private use and enjoyment thereafter were destroyed. Formal proceedings in condemnation were not begun until January 18, 1915, when the
79 Government filed its petition in the court below for that purpose. The petition expressly averred that the lands "were flooded and thereby appropriated by the Government of the United States" on April 19, 1912, but that no compensation had yet been paid. The prayer of the petition asked, among other things, that the lands be decreed to be the property of the Government "from the date of the said taking or the appropriation thereof." Commissioners were appointed to assess the damages. Their report, February 23, 1917, was confirmed by the court, and on July 27, 1917, the Government was directed to pay the awards to the clerk for the benefit of the defendants in error. The commissioners followed the customary practice of valuing the property as of the time of appropriation, and they therefore stated in their report that the amounts awarded were as of April 19, 1912, also that they had included therein no interest to the time the Government's petition was filed or to the date of their report. Upon motion of the defendants in error the court, by supplemental order on October 1, 1917, required the Government to deposit with the clerk, in addition to the amount of the awards, a sum equal to interest thereon at 6 per cent per annum from April 19, 1912, to the time the deposit was made. The addition required was not interest as such but a sum equal to interest.

It is urged that no interest can be allowed against the United States in a condemnation case for any period prior to final judgment or for any period prior to an order of the court placing the United States in possession of the lands condemned; also that irrespective of the time for computation there is no authority of law for a rate of 6 per cent. Among the many authorities relied on is United States v. Baird, 127 U. S. 251, 260, where the court said:

"It has been established, as a general rule, in the practice of the Government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by Congress on special application. The only recognized exceptions are, where the Government stipulates to pay interest and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages."

Section 177 of the Judicial Code (Rev. Stats., sec. 1091) provides:

"No interest shall be allowed on any claim up to the time
80 of the rendition of judgment thereon by the Court of Claims unless upon a contract expressly stipulating for the payment of interest." Without further reference to the many authorities cited,

it may be said that the position of the Government is fully illustrated by the above excerpt and statute. We think that the question is settled in this court by United States v. Sargent, 89 C. C. A. 81, 162 Fed., 81, in which interest at 6 per cent was allowed in a similar case as a part of the "just compensation" required by the fifth amendment to the Constitution. In the matter of the time and the rate of interest the court followed the rule in Minnesota, where the property was located and the condemnation proceedings were had. The case was taken to the Supreme Court but was afterwards dismissed on the motion of the Solicitor General. In New Mexico, where the case at bar arose, the legal rate is 6 per cent. In Atchison, T. & S. F. R. Co. v. Richter, 20 N. M., 278, 148 Pac. 478, it was held that the owner should have interest "from the time his possession is invaded, either with or without an order of court."

In the rule of immunity of the Government from liability for interest the term "interest" is generally used as meaning compensation for the use or forbearance of money, or damages for its detention. But the position of the Government in the case at bar is not like that which it occupies when a claim or demand on contract is asserted against it. True, it is said that when the Government takes possession of private property for public use in advance of formal proceedings in eminent domain, the right of the acquiescing owner arises ex contractu (United States v. Great Falls Mfg. Co., 112 U. S., 645); but that is by way of implication that compensation is intended by the Government instead of a trespass for which the landowner has no enforcible remedy. The duty and obligation to make just compensation in such a case is fundamental, and whatever is an essential element in that compensation can not be excluded even by legislative enactment. The question of compensation is a judicial one. Monongahela Navigation Co. v. United States, 148 U. S., 312, 327.

Just compensation rests on equitable principles and it means substantially that the owner should be put in as good position pecuniarily as he would have had if his property had not been taken. United States v. Nahant, 82 C. C. A., 470; 153 Fed., 520. When in the exercise of its sovereign power the Government actually appropriates and takes possession of private property in advance of proceedings in condemnation, interest from the time of taking is in a sense a convenient commutation of the value of the use of the property or the direct loss the owner sustains until the value of the property itself is paid by deposit in court or otherwise. Something of substance is lacking in an award that omits all consideration of the time of the prior actual taking. That would be obvious in the case of a completed office building, and the difference here is but in degree, not in principle. An instance in which interest was regarded as an integral part of the principal sum in issue and not within the statutes and decisions exempting the Government may be found in United States v. New York, 160 U. S., 598, 619. That was not a case of appropriation of private property, but there is a

81

relevant analogy. In United States v. Cress, 243 U. S., 316, 319, the judgment of the District Court, which was affirmed, embraced interest, but the period for which it was allowed does not definitely appear. United States v. First Nat. Bank, 250 Fed., 299, is in point. There the Government took possession of property some months before commencing condemnation proceedings in the District Court. In instructing the commissioners respecting their duties the court said: "The sole question for you to determine, in each one of the cases, is the value of the lands and the property at the time of the actual taking and occupation by the United States, together with interest at the rate of 8 per cent per annum, the legal rate in Alabama, on said sums so ascertained by you, from the date of such actual taking and occupation." The proceedings in that case were under the act of July 2, 1917, 40 Stat., 241, which provided that they "should be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted." But as regards the essential elements of the just compensation to be paid, the requirement is not different from the conformity provisions of sec. 2 of the act of August 1, 1888, supra, applicable to the case at bar.

The order is affirmed.

Filed March 25, 1919.

82 (Judgment.)

United States Circuit Court of Appeals, Eighth Circuit.

December term, 1918.

TUESDAY, *March 25, 1919.*

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR, *vs.* WILLIAM E. ROGERS, V. B. SHORT, H. L. WILSON, S. F. MILES, GEORGE N. UPHAM, BRYAN BANTA, J. C. MINGS (MINGA), HENRY ZAJIC, CURTIS V. YOH, MARY Z. MCCRILLIS, J. G. DETLING, and G. H. SCRIPPS.	No. 5166.

In error to the District Court of the United States for the District of New Mexico.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of New Mexico, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District court in this cause be, and the same is hereby, affirmed without costs to either party in this court.

MARCH 25, 1919.

(Petition for writ of error from Supreme Court, U. S.)

To the honorable judges of the United States Circuit Court of Appeals, Eighth Circuit:

The above-named plaintiff in error, the United States of America, feeling aggrieved by the judgment entered in the above-entitled
83 cause on the 25th day of March, A. D. 1919, affirming the judgment of the United States District Court for the District of New Mexico, awarding William E. Rogers, V. B. Short, H. L. Wilson, S. F. Miles, George N. Upham, Bryan Banta, J. C. Mings (Minga), Henry Zajic, Curtis V. Yoh, Mary Z. McCrillis, J. G. Detling, and G. H. Scripps interest at six per cent (6%) per annum from April 19, 1912, to date of deposit in court, on the amounts of compensation awarded said parties by the judgment entered by said District Court on July 27, 1917, does hereby apply for a writ of error from the United States Supreme Court, for the reasons set forth in the assignment of errors filed herewith, and prays that the said writ of error may be allowed, and that ci'ation issue as provided by law, and that a transcript of the record upon which said judgment was based, duly authenticated, be sent to the said United States Supreme Court, under the rules of said court in such cases made and provided.

S. BURKHART,
United States Attorney for the Dist. of New Mexico.
A. MITCHELL PALMER,
Attorney General.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jun. 24, 1919.

(Assignment of errors on writ of error from Supreme Court, U. S.)

Now comes the plaintiff in error in above-entitled cause and files the following assignment of errors upon which it will rely upon prosecution of its writ of error in above-entitled cause, to the judgment entered by this court on the 25th day of March, A. D. 1919.

I. That the United States Circuit Court of Appeals, for the 8th Circuit, erred in affirming the judgment of the United States District Court for the District of New Mexico entered October 1, A. D. 1917,
84 awarding interest against the United States from April 19, 1912, to date of deposit of awards in court, for the reason that interest is not properly and legally allowable in a condemnation case against the United States for any period prior to date of final judgment.

II. That the United States Circuit Court of Appeals, 8th Circuit, erred in affirming the said judgment of the United States District Court for the District of New Mexico awarding interest against the United States from April 19, 1912, to cate of deposit of awards in court, for the reason that interest is not properly and legally allowable in a condemnation case against the United States for any period prior to date of order of court placing the United States in possession of the lands condemned.

III. That the United States Circuit Court of Appeals, 8th Circuit, erred in affirming the said judgment of the United States District Court for the District of New Mexico in awarding interest against the United States from April 19, 1912, to date of deposit of awards in court, for the reason that interest is not properly allowable by the court, as a matter of law, to be added to the award of the Commissioners, the question of whether or not additional compensation as an element of damage on account of use and occupation of the lands condemned prior to the date of judgment in condemnation or payment of compensation, being a matter for the decision of the commissioners or jury, in the light of the conditions prevailing.

IV. That the United States Circuit Court of Appeals, 8th Circuit, erred in affirming the said judgment of the United States District Court for New Mexico, in awarding interest as aforesaid, for the reason that the defendants, prior to the report of the commissioners, fixing their compensation and the confirmation of said report by the court, did not demand interest in their pleadings, and did not request the commissioners to allow interest or additional compensation as damages in lieu thereof, on account of the use of the premises appropriated prior to judgment in condemnation or payment of compensation, and the court was not requested to instruct
the commissioners to allow interest or additional compen-
85 sation in their judgment, such interest or extra compensation should be allowed in the circumstances.

V. That the United States Circuit Court of Appeals, 8th Circuit, erred in holding that, as a matter of law, interest is a part of the just compensation guaranteed by the Constitution of the United States, and that such interest should be allowed by the court as a matter of law from April 19, 1912, to date of deposit of awards in court.

VI. That the United States Circuit Court of Appeals, 8th Circuit, erred in affirming the decision of the United States District Court for the District of New Mexico in awarding interest at the rate of six per cent (6%) per annum against the United States from April 19, 1912, to date of deposit of awards in court, for the reason that there is no authority of law for allowing interest at said rate on judgments against the United States.

Wherefore, plaintiff in error prays that said judgment or order be reversed and that said United States District Court for the District of New Mexico be ordered to enter a decree reversing the decision of the lower court in said cause.

S. BURKHART,
United States Attorney for
the District of New Mexico.
A. MITCHELL PALMER,
Attorney General.

(Endorsed) : Filed in U. S. Circuit Court of Appeals, Jun. 24, 1919.

(Order allowing writ of error from Supreme Court, U. S.)

On this 23rd day of June, A. D. 1919, came the plaintiff in error, the United States of America by P. W. Dent, Dist. counsel, U. S. Reclamation Service, and presented to the court its petition praying for the allowance of a writ of error, together with assignment
86 of errors intended to be urged by it. Praying also that a transcript of the record, proceedings and papers on which the judgment and order appealed from was rendered, duly authenticated, may be sent to the United States Supreme Court, and that such other and further proceedings may be had as may be proper in the premises:

On consideration whereof the court does allow the writ of error as prayed.

WALTER I. SMITH,
Judge of the United States Circuit Court of Appeals, 8th Circuit.

Council Bluffs, Iowa, June 23, 1919.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jun. 24, 1919.

87 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the United States Circuit Court of Appeals, Eighth Circuit, greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals, 8th Circuit, before you, or some of you, between the United States of America and Williams E. Rogers, V. B. Short, H. L. Wilson, S. F. Miles, George N. Upham, Bryan Banta, J. C. Mings (Minga), Henry Zajic, Curtis V. Yoh, Mary Z. McCrillis, J. G. Detling, and G. H. Scripps a manifest error hath happened, to the great damage of the said the United States of America, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid, at the city of Washington, District of Columbia, and filed in the office of the clerk of the United States Supreme Court, on or before the 20th day of August, 1919, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of

right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice
88 of the United States, this 24th day of June, in the year of our Lord one thousand nine hundred and nineteen.

Issued at office in the city of St. Louis, Missouri, with the seal of the United States Circuit Court of Appeals for the Eighth Circuit and dated as aforesaid.

[SEAL.] E. E. KOCH,
Clerk U. S. Circuit Court of Appeals for the Eighth Circuit.

Allowed by

WALTER I. SMITH,
Judge United States Circuit Court of Appeals, 8th Circuit.

June 23d 1919.

Return to writ.

UNITED STATES OF AMERICA, *Eighth Circuit, ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things, concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit at office in the city of St. Louis, Missouri, this twenty-second day of July, A. D. 1919.

[SEAL.] E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Endorsed:) No. 5166. United States of America, plaintiff in error, vs. William E. Rogers et al., defendant in error. Writ of error from Supreme Court, U. S. Filed June 24, 1919. E. E. Koch, clerk.

89 THE UNITED STATES OF AMERICA.

To, William E. Rogers, V. B. Short, H. L. Wilson, S. F. Miles, George N. Upham, Bryan Banta, J. G. Mings (Minga), Henry Zajic, Curtis V. Yoh, Mary Z. McCrillis, J. G. Detling, and G. H. Scripps, greeting:

You are hereby cited and admonished to be and appear in the United States Supreme Court at Washington, District of Columbia, sixty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the United States Circuit Court of Appeals, 8th Circuit wherein the United States of America is plaintiff in error, and you are defendants in error, to

show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Walter I. Smith, Judge of the United States Circuit Court of Appeals, 8th Circuit, this 23d day of June, in the year of our Lord one thousand nine hundred and nineteen.

WALTER I. SMITH,
Judge of the United States Circuit Court of Appeals, 8th Circuit.

Receipt of a copy of the foregoing citation is hereby acknowledged and further service thereof is hereby waived on behalf of defendants in error W. E. Rogers, V. B. Short, Geo. N. Upham, J. G. Detling, and G. H. Scripps, this 2nd day of July, A. D. 1919.

GEORGE S. DOWNER,
Albuquerque, N. M.

Receipt of a copy of the foregoing citation is hereby acknowledged and further service thereof is hereby waived on behalf of defendants in error H. L. Wilson, Bryan Banta, and J. C. Mings (Minga), this 7th day of July, A. D. 1919.

J. H. JACKSON,
Artesia, New Mexico.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 5166. United States of America, plaintiff in error, vs. William E. Rogers, et al. Citation and acknowledgments of service. Filed July 19, 1919. E. E. Koch, clerk.

90 (Clerk's certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of New Mexico, as prepared and printed, under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals, wherein The United States of America was plaintiff in error, and William E. Rogers, et al., were defendants

in error, No. 5166, as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original writ of error with the clerk's return endorsed thereon and the original citation with acknowledgments of service endorsed thereon are hereto attached and herewith returned.

I do further certify that on the thirty-first day of May, A. D. 1919, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the judges of the District Court of the United States for the District of New Mexico.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this twenty-second day of July, A. D. 1919.

[SEAL.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Endorsed on cover:) File No. 27222. U. S. Circuit Court of Appeals, 8th Circuit. Term No. 467. The United States of America, plaintiff in error, vs. William E. Rogers, et al. Filed July 28th, 1919. File No. 27222.

INDEX.

	Page.
Statement	3
Specification of Errors	7
Argument	9

CITATIONS.

STATUTES.

Act of August 1, 1888, 25 Stat. 357	3, 25
Act of June 17, 1902, 32 Stat. 388	4
Act of July 2, 1917, 40 Stat. 241	25
Judicial Code, §§ 24, 145	22
New Mexico Ann. Stat. 1915, § 2106	26
R. S. §§ 721, 914	16, 17

CASES.

Angarica v. *Bayard*, 127 U. S. 251	18
A. T. & S. F. Ry. Co. v. *Richter*, 20 New Mexico, 278	27
Bauman v. *Ross*, 167 U. S. 548	11
Billings v. *United States*, 232 U. S. 261	18
Carlisle v. *Cooper*, 64 Fed. 472	15, 18
Chappell v. *United States*, 160 U. S. 499	15
Cherokee Nation v. *Kansas Ry. Co.*, 135 U. S. 641	11
Highbridge Lbr. Co. v. *United States*, 69 Fed. 320	15
In re Post Office, 210 Fed. 832	11
In re Secretary of Treasury, 45 Fed. 396	15
Kanakanui v. *United States*, 244 Fed. 923	15
Kohl v. *United States*, 91 U. S. 367	15
Latinette v. *City of St. Louis*, 201 Fed. 676	15
Savings Bank v. *United States*, 19 Wall. 227	18
Shoemaker v. *United States*, 147 U. S. 282	11
Town of Hingham v. *United States*, 161 Fed. 295	15
Town of Nahant v. *United States*, 136 Fed. 273	15, 17
Turner v. *Woodard*, 259 Fed. 737	11

	Page.
United States v. *Certain Lands in Newcastle*, 165 Fed. 783	15
United States v. *Engeman*, 46 Fed. 898	15
United States v. *First Nat. Bank*, 250 Fed. 299	11
United States v. *Forbes*, 259 Fed. 585	15
United States v. *Herron*, 20 Wall. 251	18
United States v. *Land in Monterey County*, 47 Calif. 515	28
United States v. *Lynah*, 188 U. S. 445	12
United States v. *North American Transp. Co.*, decided June 1, 1920	13, 22
United States v. *North Carolina*, 136 U. S. 211	18
United States v. *O'Neill*, 198 Fed. 677	15
United States v. *Rogers*, 257 Fed. 397	6
United States v. *Sargent*, 162 Fed. 81	10, 15
United States v. *Sherman*, 98 U. S. 565	18
United States v. *Thompson*, 98 U. S. 486	18
United States v. *Verdier*, 164 U. S. 213	18
Village of St. Johnsville v. *Smith*, 184 N. Y. 341	28

MISCELLANEOUS.

Cyc., vol. 15, p. 930	24
Lewis, Em. Dom. (3rd ed.), vol. 2, §§ 645, 742	21, 24
Nichols, Em. Dom. (2nd ed.), vol. 1, § 216	24
Nichols, Em. Dom. (2nd ed.), vol. 2, § 432	21
R. C. L., vol. 10, p. 163	24

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA, *Plaintiff in Error,*
v.
WILLIAM E. ROGERS *et al.* | No. 147.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

The writ of error in this case seeks to review a judgment of the Circuit Court of Appeals affirming a judgment of the District Court in a proceeding instituted by the Government to condemn land. The specific complaint is that the court added to the damages awarded by the commissioners a sum equivalent to 6% per annum on the amount of damages from the date the land was taken to the date when the amount of the award was deposited.

STATEMENT.

The suit was brought January 18, 1915, in the mode prescribed by the Act of August 1, 1888, c. 728, 25 Stat. 357, in the District Court of the

United States for New Mexico, to condemn real estate of defendants in error in reliance on the Reclamation Act approved June 17, 1902, c. 1093, 32 Stat. 388. R. 4.

The petition avers that pursuant to the latter act and amendatory and supplemental legislation, the Secretary of the Interior December 18, 1905, caused to be purchased and thereafter maintained Carlsbad Irrigation System in Eddy County, New Mexico; that to provide water storage for more extensive irrigation of arid lands it was decided to construct additional works which were completed April 19, 1912; that, to carry out the provisions of the act of June 17, 1902, and amendments, and to provide the needed storage and for other necessary connected purposes, it became necessary, and the Secretary of the Interior so determined, to acquire defendants' real estate, and, at the date of completion of the additional works, lands of defendants were flooded "*and thereby appropriated by the Government of the United States under authority of the said Acts of Congress aforesaid for said necessary purposes;*" that the owners have received no compensation; that funds necessary to pay "any and all damages that may be awarded to said defendants, and each of them, on account of the taking and appropriation by plaintiff of the lands and real estate hereinafter described" are now available in the reclamation fund; that the Attorney General,

following a request of the Secretary of the Interior, dated December 19, 1914, has caused proceedings to be instituted for condemnation of real estate so appropriated by the United States April 19, 1912. R. 6–8. It was prayed that the court appoint commissioners to assess the damages which the owners had sustained in consequence of the taking and appropriation by plaintiff of the several real estates described; that upon payment of the amount thus assessed the land be adjudged and decreed by the court *to be the property of plaintiff from the date of the said taking or appropriation thereof* " by said plaintiff as aforesaid " to be held in " fee simple." R. 55.

The record does not indicate what pleadings, if any, were filed by the defendant land owners. The matter of compensation was submitted to commissioners, whose awards were filed February 3, 1917. Judgment, overruling exceptions, approving and confirming the awards and reciting that no appeals had been perfected, was entered July 27, 1917, directing that the aggregate sum of the awards on account of the taking and appropriation be deposited and distributed for the benefit of the several owners (R. 56–57) and ordering that, on such deposit, the United States of America be let into possession of the premises for the uses and purposes set forth in the petition. R. 68.

Nothing appears in the record from which it can be learned that defendants in error in pleadings,

or at trial before the commissioners, or by application to the court to instruct the commissioners, brought forward—

(a) a demand that interest be added to the appraisal either as of right or as a proper and convenient method of measuring damages assessable for deprivation of use and occupation prior to payment for the land;

(b) a claim that any *actual* damage had been sustained because of such deprivation;

(c) evidence to establish the *fact* or the *quantum* of such actual damage before the commission or the court.

Defendants in error did not except to the judgment of July 27, 1917, but some time thereafter presented a motion (R. 69) for supplemental order, requiring the United States to deposit sums equal to six per cent interest on the several awards, calculated from April 19, 1912, until date of their deposit, representing that nothing by way of interest had been added thereto by the commissioners. Thereupon the court, on October 1, 1917, allowed the order requiring deposit of the additional sum asked for, to which action the United States excepted (R. 71) and prosecuted writ of error from the Circuit Court of Appeals, Eighth Circuit, which on March 25, 1919, affirmed the judgment below. R. 79. To review this judgment a writ of error from this court has been sued out. The opinion below (R. 78) is reported in 257 Fed. 397.

Considering what is averred in the petition it appears that the government exercising eminent domain power took possession of private lands April 19, 1912; instituted judicial proceedings formally to expropriate them January 18, 1915, and paid into court about July 27, 1917, damages awarded by court commissioners therefor but without interest as such on the sum found due. The judgment thereafter, whereby the court as matter of legal right added a sum equivalent to six per cent (the legal rate of interest in New Mexico), is justified on the ground that "when in the exercise of its sovereign power the government actually appropriates and takes possession of private property in advance of proceedings in condemnation, interest from the time of taking is in a sense a convenient commutation of the value of the use of the property or the direct loss the owner sustains until the value of the property itself is paid by deposit in court or otherwise." Opinion, C. C. A., R. 78.

SPECIFICATION OF ERRORS.

In substance the errors assigned are (R. 80–81):

(1) In proceedings for condemnation brought by the United States the interest claimed (at a fixed rate) for any period prior to final judgment or prior to a court order placing them in possession is not properly and legally allowable as of right or as part of the just compensation guaranteed by the Constitution.

(2) What compensation, if any, should be allowed as an added element of damages on account of use and occupation enjoyed prior to payment of compensation awarded for the land, is matter for consideration in the light of prevailing conditions by the commissioners of appraisal or by jury.

(3) As defendants in error did not demand interest in their pleadings or request of the commissioners its allowance, or, in lieu thereof, damages for use and occupation, or ask the court to instruct the commissioners to allow either interest or damages, it was error for the court to enter the order for payment of interest after hearing and judgment confirming the report.

The error stated broadly was in ruling that in this proceeding, under the pleadings as framed, the landowner was entitled as of right, in addition to the appraised value of the land, to the equivalent of interest thereon at the local prevailing rate in lieu of compensation representing the actual value of the use of the property from 1912, when it was taken, to the date when its value was finally judicially fixed and paid. More narrowly, since the damages actually sustained because of such prior use were not left to the judgment of the commissioners, it was not the province of the court to determine them afterwards by adding to the award interest at the rate fixed by the law of New Mexico, and hence it was error to rule that, as the necessary result of the

facts on the record, the award bore interest as of right at a fixed rate as a convenient commutation of the loss of possession.

ARGUMENT.

Whether interest at the prevailing local rate is really the substantial equivalent of the actual damages suffered by loss of the use of real estate (its rental value) is a question of fact which should be left, under proper instructions as to evidence, to appraisers or to a jury. The sum due from the United States as compensation for use of premises occupied under the power of eminent domain should not be measured by what the several state authorities fix as the legal rate of interest on borrowed money. Cases can be imagined where the loss thus sustained would not be adequately compensated by interest at a low rate. It is as easy to imagine instances where the legal state rate might be so high as to furnish no true measure of rental value especially of unprofitable wild land. It would thus come to pass that, if local regulation of interest rates on money *furnishes* the *rule* and *measure* of damages, the state government, by fixing an *excessive* rate, might successfully prevent the temporary occupation of land for Federal purposes except on terms of compensation so onerous as to be practically inhibitive. Since it is hardly arguable that the exercise of eminent domain may be thus hampered or impeded, it must follow that there was a substantial procedural error in not

allowing the commissioners to hear evidence and determine whether damages actually suffered by loss of possession were equal to or greater or less than interest at six per cent on the appraised value of the land.

Apparently there was no evidence offered on the subject at any time and there was no exception taken to the order of July 27, 1917, confirming the appraisal, which did not include interest. As it would not now seem open to remand with directions to constitute another commission to assess the actual damages suffered, defendants in error seem driven to the contention that interest as such on the award is allowable as of right and this is the crucial point.

Cases involving claims for interest have been dealt with heretofore by this court, but none quite like this. Federal statutes authorizing these proceedings ordinarily do not provide for taking possession of or for translation of title to real estates prior to the judicial appraisal and its payment. In such instances, since the payment is regarded as the operative act which transfers title to the government and moreover as the owner retains possession *pendente lite*, it has been settled that interest must not be added to the award for any period preceding its payment.[1]

---

[1] *United States* v. *Sargent*, 162 Fed. 81 (a precedent adopted in the instant case by the Circuit Court of Appeals) belongs to the class now under discussion. It was brought under the Act of August 1, 1888, *supra*, to acquire a Federal building site and it does not appear that possession was taken until payment of award. The dissenting opinion (p. 89) points out the clear conflict between the majority opinion and the two decisions of the Supreme Court just cited.

Shoemaker v. *United States*, 147 U. S. 282, 320;

Bauman v. *Ross*, 167 U. S. 548, 598;

In re Post Office, etc., Bronx, 210 Fed. 832;

Cf. Cherokee Nation v. *Kansas Ry. Co.*, 135 U. S. 641, 659–660;

Turner v. *Woodard*, 259 Fed. 737.

By the Act of July 2, 1917, c. 35, 40 Stat. 241, authority is given for expropriation of real estates for military uses, and it is provided "that when such property is acquired in time of war * * * upon the filing of the petition for the condemnation * * * immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes." Power to occupy *pendente lite* before assessment of compensation having been expressly conferred by this act on the Secretary of War, it has been supposed that, in addition to the price of the land itself, its owner is entitled to additional compensation (assessable in the proceedings authorized by the act) for the temporary occupation of his premises. In *United States* v. *First Nat. Bank*, 250 Fed. 299 (Ann. Cases 1918–E, page 36), a case brought under this statute, the owner was held entitled to the land value plus interest at the Alabama *rate*. It is submitted that there was error here (as there was in the case at bar) in assuming that, without any evidence on the subject, interest at a fixed rate can be regarded as the equivalent or measure of the actual damages suffered.

Here owners were not left in undisturbed enjoyment of their estates until payment, and hence the instant case is distinguishable from *Shoemaker* v. *United States, supra.* It differs also from those arising under the Act of July 2, 1917, *supra,* because here there is no statute authorizing disturbance of private possession before payment. The Reclamation Act authorizes acquisition of needed land only by purchase or by expropriation under *judicial* process. 32 Stat. 389, § 7. There is no legislative authority for administrative seizure of possession *pendente lite.* However, contentions founded on this distinction, which, on a different record, might well be urged, are not thought available here. In the petition presented by the government it is formally averred that the lands were appropriated in 1912 under authority of acts of Congress and that funds necessary to pay any and all damages * * * are available in the Reclamation Fund. Considering these allegations, the government does not insist that occupation for the period preceding payment was not legally or formally authorized. The argument is limited to the proposition that, on established principles, *interest* is not here legally collectible and that judgment allowing it should be reversed.[1]

[1] It might be open on a different record to contend either—

(*a*) That possession before payment by an officer is trespass for which no recovery can be had, or

(*b*) If the dam was legally authorized and if the consequence was to flood private lands, that the owners upon principles announced in *United States v. Lynah,* 188 U. S. 445, and many like cases, were en-

(1) The United States are not contractually bound for interest except by express agreement. Here obviously there is no such contract though it may be argued that the obligation to compensate for expropriated property is in the nature of an implied contract. But as such implications are admitted merely to further recovery on an assumed obligation, it is necessary to determine its extent. The limits of the particular obligation here involved (payment of compensation) have been often precisely and authoritatively defined. The implied promise is to pay the value of the property as of date of the taking but without interest. An obligation to pay interest is not *implied*. *United States* v. *North American Transp. Co.*, decided by this court June 1, 1920.

---

titled under section 145 or paragraph 20 of section 24 of the Judicial Code, to sue on implied contract to pay rent for private property informally occupied by government.

(*c*) that suit under these sections resulting in a *judgment* for damages for the informal temporary occupation of the land before the government takes title is the appropriate and *only* remedy because this is the only mode in which the United States have consented to be impleaded.

Statutory condemnation proceedings are but inquests to ascertain judicially the value of land as the condition of extinguishing the private title. Appraisals are not reduced to judgment and obviously can not take the form of unconditional judgments against the United States. Therefore, when proceedings under the Act of August 1, 1888, are brought the sole issue is the value of the *estate sought* to be *expropriated*. If it should appear that through its officers the government has already informally taken possession of the land, the damages on this account having already been sustained are not properly the subject of appraisement in this statutory inquest, but must be recovered in a separate and independent action wherein it is possible under applicable law to reduce them to judgment.

So that, conceding for argument that it is open to the land owner to claim his rights under the implied promise, his assertion of them here can add nothing to the extent of the obligation and his recovery here (as it would in the Court of Claims) would exclude interest.[1]

(2) While obligation to pay interest may be imposed by statute, there is no federal legislation justifying addition of interest as such to this award.

It is claimed that under the law of New Mexico interest in like cases is recoverable, and, basing the argument on the Act of August 1, 1888, it is urged that thereby the New Mexico rule has been adopted as the federal code governing the measure of damages in federal condemnations brought in New Mexico.

No authoritative case has been found holding that the United States have adopted the local code in respect of matters of substantive law. The quantum of compensation due for expropriation of land is a matter of substance. It is essentially a federal question to be determined upon construction of the Constitution and the statutes of the United States and by independent application of general principles of jurisprudence thereto.

---

[1] Suits on implied contracts of the government have no proper place in statutory condemnation proceedings brought under the act of August 1, 1888, *supra*. The purpose of these proceedings is to exert power conferred on government to procure an appraisal or inquest of value, which *provided* it is accepted and paid by the official controlling the appropriation, completes the taking determined by him to be necessary.

Carlisle v. *Cooper,* 64 Fed. 472;

Highbridge Lumber Co. v. *United States,* 69 Fed. 320;

Town of Nahant v. *United States,* 136 Fed. 273;

United States v. *O'Neill,* 198 Fed. 677, 680, 682;

Latinette v. *City of St. Louis,* 201 Fed. 676, 678;

Kanakanui v. *United States,* 244 Fed. 923;

United States v. *Forbes,* 259 Fed. 585, 594;

Cf. also *Kohl* v. *United States,* 91 U. S. 367; *Chappell* v. *United States,* 160 U. S. 499, 509, 512–514; *In re Secretary of the Treasury,* 45 Fed. 396; *United States* v. *Certain Lands in Newcastle,* 165 Fed. 783, 786–7; Dissenting opinion *United States* v. *Sargent,* 162 Fed. 85.

CONTRA.

United States v. *Engeman,* 46 Fed. 898, a case which appears not to have been followed in the second circuit.

Town of Hingham v. *United States,* 161 Fed. 295, 300, a case which supports denial of interest but which seems to base its reasoning on the controlling effect of the state law. The suit was prosecuted under a statute whose text differs from that of the Act of August 1, 1888, but which is thought to have the same meaning.

United States v. *Sargent,* 162 Fed. 81. The majority opinion while allowing interest does not admit controlling effect of the state law. Page 84.

The language of the second section of the Act of August 1, 1888, is modal and directory and but carries over into condemnation proceedings the similar provision found in section 914, R. S. It was designed to bring about conformity to state practice. It has no reference to substantive rights or obligations. To illustrate:

In *United States* v. *O'Neill, supra,* it was held that the fundamental question of the necessity for the taking was not regulated by a state law but was entirely a federal question. In the same case a state statute requiring deposit of the award in certain circumstances was not followed.

In *Carlisle* v. *Cooper, supra,* state statutes imposing costs and allowances were ignored because thereby a substantive obligation was imposed inadmissible against the government.

In *Highbridge Lumber Co.* v. *United States, supra,* it is said in substance that whether consequential damages are recoverable is a federal question.

In the well considered opinion in *Town of Nahant* v. *United States, supra,* it is held that both the right to compensation and its measure may be determined without regard to state law.

Considering what is said in the cited cases (well summed up in *Kanakanui* v. *United States, supra*), it will be seen that it is logically impossible to assume that federal power of eminent domain was intended by the Congress to be exerted on conditions prescribed by the varying laws of the

forty-eight states of the Union. If federal rights and obligations are thus controlled, it is conceivable that federal *power* might be frustrated by local legislation or decisions hampering it with impossible or impracticable conditions or too costly requirements. It was not intended by this statute to curb or control the federal judiciary in settling the limits of the "just compensation" guaranteed by the Fifth Amendment by forcing them to adhere to principles formulated by state legislatures or state courts, some of which might fall short of justice either to the land owner or to the government.

As it seems clear that the Congress has not adopted the local code of New Mexico in respect to any matter affecting substantive rights or obligations of the United States, it follows that there is no statute imposing obligation to pay interest in eminent domain proceedings.

Section 721, R. S., adopting state laws as rules of decision in the federal courts in cases where they apply, does not oblige the United States to pay interest made legal by New Mexico because her laws do not (even if they purport to do so) confer on the United States power to expropriate land within her borders. The power here employed having its source exclusively in the *federal statutes* on the subject, state law cannot affect the federal government in this or indeed in any other of its sovereign capacities. *Town of Nahant* v.

United States, 136 Fed. 273, 276. Consequently, substantive rights and obligations springing therefrom, even when, as suitor, the government asserts them in its courts, are not subject, because of section 721, to either express or implied limitation or definition by state authority.

Carlisle v. *Cooper,* 64 Fed. 472, 474;
Savings Bank v. *United States,* 19 Wall. 227, 237, 240;
United States v. *Herron,* 20 Wall. 251, 255, 260;
United States v. *Thompson,* 98 U. S. 486;
Cf. *Billings* v. *United States,* 232 U. S. 261, 284.

(3) It is not only well recognized that the United States are not obliged to pay interest except under express contract or statute (*United States* v. *North Carolina,* 136 U. S. 211), but, furthermore, no sovereign state is bound to pay interest because payment of its obligations has been delayed. Interest as damages for detention of money (though sometimes recoverable from individuals) cannot be added to obligations of the United States. This distinction is based upon the presumption of law that the government is always ready and willing to pay its debts and that delay or default cannot be attributed to it. Ibid.

United States v. *Sherman,* 98 U. S. 565;
Angarica v. *Bayard,* 127 U. S. 251, 260;
United States v. *Verdier,* 164 U. S. 213, 218, 219.

It should be noted that the delay here was not due to default or to unwillingness to pay, but occurred because the government and the land owner could not agree on the value of the property. R. 19. It thus became necessary to submit that question to indifferent appraisers in the mode prescribed by the condemnation statute. The damages claimed were impossible of liquidation until this process resulted in an award. Until then there was no *certain sum* due or demandable. In submitting the question to the courts, as prescribed by statute, the government pursued the only course available to liquidate its indebtedness and hence cannot be said to be guilty of detaining or withholding an *ascertained* debt.

From the foregoing it follows:

That in the absence of proof that a sum equal to six per cent on the award was the equivalent of actual damage sustained by occupation prior to the award, the court erred when, of its own motion and without submitting the matter to the commission, it entered the order of October 1, 1917, directing deposit of interest.

Aside from this, it is also clear that if the matter had been submitted, as it should, to be tried by the commissioners it would have been error to instruct them that, *as matter of law and without further proof,* they might add interest at the fixed rate of six per cent as the equivalent of or in lieu of damages actually due the land owner for loss of possession.

This proposition grows clearer when we consider that, if interest at a *fixed rate* is the allowable and convenient substitute for or measure of the damages due for the sovereign's use and occupation of land prior to payment therefor, the rule must be applied in *every case.* And hence the owner of a vacant city lot or of wild unproductive land having a nominal rental value would receive the same proportionate compensation as would be awarded under the rule to the owner of productive real estate whose rental value on the market is double the legal rate of interest.

It is impossible to escape the conclusion that when interest at a fixed rate is added to the award as a *legal right,* it is in substance and effect precisely the same thing as allowance of interest as *damages* for *delay* in paying for the land. Since it is evident the statutory rate of interest on loaned money is not always or often the standard by which rental value—the actual loss—can be justly estimated, plainly the consideration which induced its application in this case was that it was thought right to add interest for the *detention* of the price of the land. But this, however just in the abstract, cannot be done in respect of a payment delayed by the government.

The petition alleges that the actual appropriation took place in 1912. Payment said to represent the value of the fee only estimated as of April 19, 1912, was made in 1917. The government has extinguished the private title in consideration of this

payment. In addition it has had possession from 1912 to 1917, while the owner has lost whatever such possession may have been worth on the market. The case for defendants in error, favorably stated, is that the award for the value of their estates has not compensated in full for all that has been lost and that, from the standpoint of equity, the award without interest falls short of actually compensating for five years' loss of use of their property.

The government has endeavored to show that the loss, if it occurred and is not represented in the award, cannot be made up by requiring the government to pay interest. It is not necessary to discuss whether, if evidence showing market value (measured in terms of rent or otherwise) of use of the land for the period had been offered, the land owner should have had an additional award. Assuming that it would be just to allow it, it does not appear from the record that any effort was made before the commission or elsewhere to prove rental value or other actual loss suffered. The burden of proving his losses is on the land owner.

> 2 *Lewis Em. Dom.* (3rd Ed.), § 645, pp. 1112–1115;
> 2 *Nichols Em. Dom.* (2nd Ed.), § 432, pp. 1138–1140.

He has not assumed this burden and, moreover, failed to except to the order of July 27, 1917 (R. 56–68), directing deposit of the awards brought

in by the commissioners which did not include interest. The supplemental order of October 1, 1917 (R. 70–71), was entered on motion without further proof. If reversed by this court, it would follow that as the record stands the order of July 27, 1917, should not be modified and that a new trial to try the question of actual loss should not be accorded.

It should be noted that at any time after April 19, 1912, the land owner might have sued the United States under section 145 or section 24 (paragraph 20) of the Judicial Code, treating, as he might, the flooding as an expropriation vesting title to the land in the Government and vesting in him, *eo instanti*, a right of action on implied contract. *United States* v. *North American Transp. Co., supra.*

In this recent case—an appeal from a judgment of the Court of Claims allowing the value of land without interest on implied contract to compensate as of the date of its taking—the court, after stating the rule, in disposing of the point that interest should have been allowed (not *qua* interest for default or delay in payment, but as measure of compensation for use and occupation for the period preceding payment), said:

> It may be that, even in the absence of the conformity provision referred to above, interest could be collected as a part of the just compensation in condemnation proceedings brought by the Government.

The opinion then points out that in proceedings in the Court of Claims the basis of the action is recovery of money which the government is assumed to have promised to pay and that power to allow interest as such on that sum is denied and proceeds as follows:

> Furthermore, if it is not interest which the company seeks the facts found fail to supply the basis on which any claim in addition to that for the value of the property should rest. The petition states that the United States is indebted to claimant in addition to the $100,000 alleged to be the value of the property, the further sum of $7,500 per annum for the use and occupancy thereof from December 8, 1900. Except for this allegation the company did not, so far as appears, make any request of any kind in the court below in respect to an allowance for use and occupation. The court does not mention the subject in the opinion; and it is not referred to in the application for an appeal.

What the decision would be in statutory condemnation proceedings or in suit in the Court of Claims where there was proof of actual damage justifying allowance for use and occupation preceding payment is not explicitly indicated. The court does not say that there is anything in principles announced necessarily forbidding recovery on this account. But it is clear from the reasoning that recovery, if had, must be based on showing of actual loss, and, when that is lacking, that

interest can not be allowed of right by the court as the equivalent or as a substitute *for* damages claimed but not proven.

Space has not been taken for the many decisions which, construing state statutes or applying principles as to compensation thought sound by state courts, hold that interest must be added to the award from the time when the owner is dispossessed; or from the time proceedings are instituted; or from date of judgment and so forth.

1 *Nichols Em. Dom.* (2nd Ed.), §216;
2 *Lewis Em. Dom.* (3rd Ed.), §742;
10 *R. C. L.* 163;
15 *Cyc.* 930, 931.

These cases are mainly proceedings brought by or against public service corporations to whom eminent domain power has been delegated by the states. It is, of course, well within state power either by statute or by judicial construction to provide for interest on awards of damages due from such corporate bodies. The reasons upon which such recovery is allowed can throw no light whatever upon similar liability of the United States, because necessarily these decisions do not concern themselves with the immunity of the sovereign. Whereas, here, the proposition is that judgment for interest is improper because the United States as sovereign cannot be charged therefor except by contract or by statute and can never be held liable for interest as damages for the use or for the detention of money, or for delay in settlement of

claims. This, of course, is a principle wholly inapplicable to railroads or telegraph companies or other public service corporation exercising delegated eminent domain power.

In conclusion, the government desires again to urge that the decision here should not hinge on the theory that its substantive rights and obligations are regulated by the law of the state where the expropriated land lies.

As a rule judicial condemnations maintainable under federal legislation belong to one of two classes—

(a) Those like the instant case brought under the general procedural statute (Act of August 1, 1888, 25 Stat. 357), the second section of which reads:

> The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding.

(b) Those brought under Acts like that of July 2, 1917, 40 Stat. 241, already mentioned, providing in substance for—

> such proceedings to be *prosecuted* in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted.

It is most earnestly insisted that there was no intention *in either act* to adopt state codes in respect of matters of substantive law but that it was the purpose of Congress merely to regulate *practice* in the federal courts by requiring them to proceed in accordance with state adjective law in like causes.

The question directly pertinent here is the proper construction of the Act of August 1, 1888. Statement has already been made of the reasons and authorities relied on to show that it should not be construed as either textually or by implication adopting substantive state law. The argument, it is believed, applies with equal force to the construction of the Act of July 2, 1917, and some of the cited cases deal with statutes employing similar language.

If this court should, notwithstanding, hold that state law governs in this case on the substantive question of the quantum and measure of damages due, the precedent established will necessarily control in the construction of the Act of July 2, 1917. The consequences in respect of cases brought under either statute will be most serious.

Assuming that the state code is held to govern here, the applicable law is in part section 2106, New Mexico Ann. Stat. 1915, reading:

> For the purposes of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the notice, and its actual value at that date shall be the measure of compensation of all

> property to be actually taken, and also the basis of damages to property not actually taken but injuriously affected, and in all cases where such damages are legally recoverable. If an order be made letting the plaintiff into possession as provided in this chapter, the compensation and damages awarded shall draw lawful interest from the date of such order. No improvements put upon the property, subsequent to the date of the service of notice or put thereon after the actual taking of the land, shall be included in the assessment of compensation or damages.

In a proceeding brought in 1912 to condemn land tortiously occupied since 1907 with rails and other improvements by the condemning railroad, the New Mexico Supreme Court construed section 2106 (§ 9, c. 97, Laws of 1905), saying:

> While the provision quoted does not in terms cover a case where possession has been taken prior to condemnation proceedings, as in this case, we believe that the provision shows a legislative intent that the owner shall receive interest from the time his possession is invaded, either with or without an order of the court.
>
> *A. T. & S. F. Ry. Co.* v. *Richter,* 20 N. M. 278, 305.

The Circuit Court of Appeals cites this as a statement of the applicable New Mexico rule.

It is interesting to note (*passim*) that the court below appraised the property according to its value in 1912, when it was actually flooded and appro-

priated, thus completely ignoring section 2106, *supra,* which directs that the property must be valued as of the date of the notice of *presentation* of *petition for condemnation.* If there had been real compliance with local law and with its judicial interpretation, the land must have been valued as of January 18, 1915 (at which date it was lying under water) and to that must have been added interest (?) *for nearly three years preceding!!*

But, putting this anomaly aside, attention is called to the principal issue in the cited New Mexico case, which was whether the condemning railroad was bound, in addition to the value of the bare land, to pay its value as *enhanced* by improvements placed there before suit to condemn was begun. The Supreme Court, overruling the lower court, held in accordance with the weight of authority that the railroad was not thus obligated although its original entry on the land was tortious. It was at least open for the Supreme Court to agree with the lower New Mexico court. There is a respectable minority of cases holding that where entry is made without consent or without statutory authority, on suit afterwards brought to condemn, the value of the land as enhanced by the condemning party's betterments is recoverable. *Village of St. Johnsville* v. *Smith,* 184 N. Y. 341, 5 L. R. A. (N. S.) 922; *United States* v. *Land in Monterey County,* 47 Calif. 515.

If, during the present emergency, before filing petition for condemnation under the Act of July

2, 1917, or under other statutes in instances not covered by that Act, it has happened that the military authorities without owners' consent or against their protests have entered on private lands and constructed thereon valuable permanent improvements, and if furthermore this has occurred in New York or in any state where it has or may be held that in such circumstances the land value as affected by improvements in place at the time suit is filed is recoverable, it will follow, if the federal courts are bound to adhere to and apply the state law, that the United States will be bound to pay not only the value of the land when it was entered on but in addition thereto the millions of enhanced value created by public expenditures for buildings, roads, streets, railways, telegraph and telephone lines and so forth, and not only that but they must pay also interest on the *combined amounts.*

CONCLUSION.

It follows that the judgment of the Circuit Court of Appeals was erroneous and should be reversed.

Respectfully submitted.

FRANK K. NEBEKER,
Assistant Attorney General.
CHARLES S. LAWRENCE,
Attorney.

NOVEMBER, 1920.

○

INDEX

Page

Statement of the Case 1
Specifications of Error 3
I. Certain Incidental Questions 5
(*a*) Assignments of error not waged in the Circuit Court of Appeals are not permissible in the United States Supreme Court 5
(*b*) Presumptions 6
(*c*) Claim of lack of evidence as to the value of the loss of possession 9
II. Definition of the term "Just Compensation" 9
III. In condemnation proceedings compensation is due upon the date of taking 12
IV. As a general rule interest is allowed from the time compensation is due and as almost a universal rule from the time of actual possession by the condemnor ..14
V. In condemnation proceedings the U. S. may be required, as a part of the just compensation, under the constitution, to pay damages in the nature of interest ..25
VI. Rents and profits not regarded as proper measure of damages for delay in payment of just compensation 39

CASES CITED.

Alloway v. Nashville, 88 Tenn. 510, 8 L. R. A. 123 18
A. T. & S.F. Ry. Co. v. Richter, 20 New Mex. 278, 140 Pacific, 478 ..... 21-29, 36
Bauman v. Ross, 167 U. S. 548 32
Boston Chamber of Commerce v. Boston, 217 U. S. 189 12
Burt v. Insurance Co., 106 Mass. 262 23
Carlyle v. Cooper, 64 Fed. 472 33

Page
Chandler v. Jamaica Pond Aqueduct Co., 125 Mass. 544 19
Edmands v. Boston, 108 Mass. 535-551 35
Great Falls Mnfg. Co. v. Garland, 25 Fed. eral, 521 15
Hayes v. Ry. Co., 64 La. 756 17
Highbridge Lumber Co. vs. U. S., 69 Fed. 320 33
Hoffman v. Philadelphia, 25 Pa., 1 26
In Re Manderson, 51 Federal, 501 12
In Re Post Office Site, 210 Fed. 832 30
In Re Rugheimer, 36 Federal, 369 11
Jones v. Ry. Co., 70 Ala. 233 36
Jones v. U. S., 48 Wisconsin, 385, 109 U. S. 513 22
Kanakanui vs. U. S., 244 Fed. 923 33
Keyser v. Phitz, 133 U. S. 138 5
Klages v. Terminal Co., 160 Pa. 386, 28 Atl. 862 38
Levee Commissioners v. Dancy, 65 Miss. 335, 3 Sou. 568 8
Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685 12
Mason City & Ft. Dodge R. R. Co. v. Boynton, 204 U. S. 570; 27 Sup. Ct. 321; 51 L. Ed. 629 39
Moll v. Sanitary District, 228 Ill. 635 17
Monongahela Nav. Co. v. U. S., 148 U. S. 324, 341, 13 Sup. Ct. 622, 27 L. Ed. 463 26-28
Norcross v. City of Cambridge, 166 Mass. 508; 44 N. E. 615, 33 L. R. A. 843 35
Old Colony R. R. v. Miller, 125 Mass. 3 18
Parks v. Boston (Mass. 16 Pick. 198) 13-34
People ex rel Central Trust Co. v. Stillings, 121 N. Y. S. 13 29
Phillips v. South Park Commissioners, 119 Ill. 626; 10 N. E. 230 19
Pine River Logging & Improvement Co. v. U. S., 186 U. S. 279, 22 Sup. Ct. 922 5
Reed v. Chicago R. Co., 25 Fed. 886 20
Shoemaker v. U. S., 147 U. S. 284 31
Southern New England Ry. Co. (R. I.) 94 Atl. 738 17

Page
Syracuse L. S. & N. R. Co. v. State, 161 N. Y. S. 477 16
Town of Hingham v. U. S., 161 Fed. 295 34
Union Pacific Ry. Co. v. Chicago R. Co., 163 U. S. 564; 16 Sup. Ct. 1173 5
U. S. v. Chandler Dunbar Water Power Co., 229, U. S. 53 12
U. S. v. Engenman, 46 Fed. 898 31
U. S. v. Cress, 61 L. Ed. 746 31
U. S. v. Nahant, 153 Federal 520 10-33-34
U. S. v. First National Bank, 250 Fed. 209 15
U. S. v. New York, 160 U. S. 598, 16 Sup. Ct. 402; 40 L. Ed. 551 38
U. S. v. North American Transportation Co. Decided June 1, 1920 37
U. S. v. O'Neal, 198 Federal 677 15-33
U. S. v. Rauers, 70 Federal 748 12
U. S. v. Rogers, 257 Federal, 397 10
U. S. v. Sargeant, 162 Federal, 81 25-28-39
Water Commrs., 195 N. Y. 502 26
Weeks v. Kress, 194 Mass. 296-298; 80 N. E. 220 12

TEXTS CITED.

Cooley's Constitutional Limitations, 7th Ed. 813 15
4 Corpus Juris, 701 6
4 Corpus Juris, 735 6
20 Corpus Juris, 641 and 642 10
Lewis on Eminent Domain, Vol. 2, 3rd Ed., Sec. 683 27
Lewis on Eminent Domain, Vol. 2, 3rd Ed., Sec. 705 40
Nichols on Eminent Domain, Vol. 1, Sec. 204 11
Nichols on Eminent Domain, Vol. 1, Sec. 216 19
Nichols on Eminent Domain, Vol. 1, p. 653 20
10 Ruling Case Law, Page 212 7
10 Ruling Case Law, Page 112 41
Sutherland on Damages, 4th Ed., Vol. 1, Sec 336 40

STATUTES CITED.

New Mexico Statutes (Sec. 2108—1915 Code) .. 9

IN THE SUPREME COURT OF THE UNITED TATES.

No. 147.

October Term, 1920.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
v.
WILLIAM E. ROGERS, *et al.*

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The statement appearing in brief of the United States with reference to the course of the proceedings and the substance of the incomplete transcript of record is substantially correct. No pretense is made of bringing up the whole record but the transcript includes only such things as within the apparent view of the United States, are necessary to affirmatively show errors relied on. In short, in line with the theory upon which this case was tried in the lower court, only so much of the record as was necessary to raise the broad general question as to the legality of adding damages in the nature of interest to the

award of the commissioners, is included in the transcript.

The theory of the plaintiff throughout the course of the trial of this case and on the appeal thereof, appears from the transcript both of the case at bar and Number 148, page 3, (paragraph 2 of agreed statement of facts) viz; that by agreement of the parties, the jury were instructed that the question of whether or not the defendant was entitled to interest on the award, was a matter of law for the determination of the Court.

Within the view of defendant in error, the important and governing facts in this case are: (1) that the land was taken and appropriated by the government on April 19, 1912; (2) that since that time the government has used the land as a reservoir site, to the entire exclusion of defendant in error; (3) that the petition for determination of assessment of damages or compensation was not filed until January 18, 1915; (4) that the compensation or damages fixed by the Commissioners was the value of the land on April 19, 1912, and did not include anything by way of interest or otherwise, as damages or additional compensation by reason of time intervening between the taking and the payment of the value of the land in court; (5) that the compensation to which defendant in error was conceded to be entitled was not fixed until the order confirming the Commissioners' report was filed.

Plaintiff in error, in the statement in its brief, page 5, complains that nothing appears in the record from which it can be learned that defendant in error in pleadings or at trial before the Commissioners, or by application to the court to

instruct the Commissioners, brought forward (a) a demand that interest be added; (b) a claim that any actual damage had been sustained because of deprivation of use, and (c) any evidence to establish the fact or quantum of such actual damage. In the first place, these matters were not preserved for appeal by any objection or exception in the lower court, and in fact are entirely contrary to the theory adopted by the plaintiff in error in the lower court, as already pointed out. In the second place, these matters were not covered either by the assignments of error or brief before the Circuit Court of Appeals. Finally, it does not lie in the mouth of the plaintiff in error to complain that the record fails to disclose these facts, inasmuch as the record brought up is concededly abbreviated and incomplete, intended only to review the simple question as to the legality of damages by way of interest on account of the time intervening between the date of the taking and the payment of the value of the land on such date into court. In this connection it is submitted that under the state of the record this court must necessarily presume that were the entire record of the cause before it, all facts and pleadings necessary to support the judgment were before the trial court, leaving the question at issue solely one of substantive law.

SPECIFICATIONS OF ERRORS.

In this court plaintiff in error relies on three specifications of errors, which are in substance:

1. That damages by way of interest are not properly and legally allowable as a right or

as a part of the just compensation guaranteed by the Constitution.

2. That the compensation allowable by way of added damages for deprivation of use and occupation is a matter only for consideration in the light of the prevailing conditions, and

3. That defendant in error did not demand interest either in the pleadings or in lieu thereof damages for use and occupation.

By reference to the transcript of record it appears that the assignments of error urged before the Circuit Court of Appeals were in substance that the trial court erred in awarding interest to the date of deposit of awards, for the reason that interest cannot properly be allowable in a condemnation case against the United States (1) for any period prior to date of final judgment, (2) for any period prior to date of the order of court placing the United States in possession, and (3) for the reason there is no authority of law for allowing interest at six per cent on judgments against the United States.

Comparing these latter specifications of error with those urged in this court, it at once appears that specifications number 2 and 3 urged in this court were not urged or relied upon in the Circuit Court of Appeals.

It also appears that the transcript of record brought to this court is entirely insufficient to predicate specifications 2 and 3 upon. As previously stated, under the abbreviated form of the record this court must necessarily presume that all of the things claimed to be lacking within these specifications were done, assuming that

they were necessary as a matter of law, which is not conceded.

ARGUMENT.

I.

CERTAIN INCIDENTAL QUESTIONS.

Certain incidental and minor questions are raised in the brief of the plaintiff in error, which as a preliminary, will be considered under one head:

(a) *Assignments of Error not urged in the Circuit Court of Appeals are not permissible in the United States Supreme Court.*

As already pointed out in the preceding statement plaintiff in error's assignments of error in this court numbered 2 and 3 were not urged in either the trial court or the Circuit Court of Appeals. This is not permissible.

AUTHORITIES.

Pine River Logging & Improvement Co. vs. U. S. 186 U. S. 279; 22 Supreme Court 922; Union Pacific Railway Co. vs. Chicago R. Co., 163 U. S. 564; 16 Supreme Court 1173; Keyser vs. Phitz 133 U. S. 138.

The reason and necessity for this rule is particularly apparent in this case. Had it been urged in the Circuit Court of Appeals that damages for use and occupation could only be assessed in the light of prevailing conditions, or that the defendants in error had failed to demand interest in their pleadings, the defendant in error could by suggestion of diminution of the record brought before that court the parts of the

record necessary for the court in determining such questions. However, this was not done, and certainly at this late date the plaintiff in error is not entitled to raise the question under the rule above quoted. Stated in another way, these assignments of error numbered 2 and 3 in this court constitute a change of the theory followed by the plaintiff in error in the trial court of the Circuit Court of Appeals. This is not permissible. See 4 Corpus Juris, 701, and cases cited in note 49.

(*b*) *Presumptions.*

The attention of the court has already been called to the abbreviated form of the record in this cause. Under these circumstances this court should indulge in all reasonable presumptions in favor of the correctness of the order from which this appeal is prosecuted. The general rule in this connection as stated in 4 Corpus Juris 735, is:

> "Presumptions favorable to the judgment, order or decree appealed from are properly indulged in a case where the record on appeal is abbreviated, defective, imperfect or incomplete, even though it is provided by statute that appellant need bring up on appeal, only a partial record of the proceedings. Where the determination of a question presented for review depends on evidence and the record on appeal does not show or purport to show all the evidence pertaining to it in the manner required by the practice in the particular jurisdiction, it will be presumed that the evidence was sufficient to sustain the ruling or the

> action of the court, or the action of the jury in case the question raised is the sufficiency of the evidence to sustain the verdict."

Even though this court might conclude that the plaintiff in error was entitled to urge its specifications or assignments numbered 2 and 3 in this court, in the light of the foregoing rule and in view of the state of the record, this court must necessarily presume, as was the case, that the trial court had before it evidence as to the prevailing conditions and that proper and seasonable demand was made for interest.

In this same connection the complaint that no interest was demanded in the pleadings can be briefly referred to. As to this question, it is submitted that in a condemnation case such as this no pleading other than one raising the general question as to the right of the government to take the land is either permissible or contemplated by the statute. (Ruling Case Law Vol. 10—Page 212 p 181). The power of eminent domain is of necessity in the sovereign and is only limited or conditioned by the constitutional provisions requiring due process of law and just compensation. In the case at bar, not only the power and authority of the United States to take the land was conceded, but it was alleged in the petition, and as appears from the agreed statement of facts and other parts of the record, it was agreed by the parties that the land in question was actually taken on April 19, 1912. Under these circumstances, the only question in the case was the quantum or amount of compensation or damages due the defendant. The government, in its peti-

tion, set forth that it was ready, able and willing to pay such just compensation when it was determined by the designated tribunal. The just compensation to which defendant was entitled and which plaintiff offered to give is guaranteed by the Constitution, and no demand was necessary on the part of the defendant in order to secure it. The rule is well stated in the case of Levee Commissioners vs. Dancy, 65 Miss. 335, 3 Southern 568, in which the court said:

> "No act which devolved on the owner the duty of initiating proceedings for compensation for his property, as the condition of his obtaining it, is allowable. He can not be required to become an actor under the penalty of losing his property and due compensation for it. if he shall not. He may enjoy his own, secure under constitutional guarantee, until an inquest by public authority determines that it is required for public use, and fixes the price to be paid him for the sale of it, etc."

The New Mexico statute does not require, authorize, and apparently does not contemplate any pleading whatsoever on the part of the defendant. Even if the owner files no pleading, and in fact makes no appearance whatever, it is the duty of the court to see that just compensation is provided before the property is appropriated, which affirmatively appears in the transcript of record in the Rogers Case, by reason of the fact that many awards were made to defendants who never appeared.

Furthermore, the New Mexico statute* (section 2108, 1915 code) does not provide for the owner to initiate any proceedings for payment of property appropriated under the power of eminent domain, but only provides for recovering compensation for damages, which we take it means damages to property not taken as incidental to property taken.

(c) *Claim of lack of evidence as to the value of the loss of possession.*

Claim is made in brief for the United States that there is no evidence as to the value of the loss of possession. This statement should be qualified to the extent of saying that no evidence appears in the record before this court as to the value of the loss of possession.

For the purpose of argument, only, counsel state that at the time of the hearing of the question as to the amount of damages, considerable evidence was heard both by the commissioners in the Rogers case and by the jury and court in the Highsmith case as to the value of the loss of possession. None of this being before this court in the claim made by the Government, very plainly can not properly be urged.

II.

DEFINITION OF THE TERM "JUST COMPENSATION."

The fifth amendment to the constitution of the

*SEC. 2108. ACTION BY OWNER.

In case property is to be, will be or has been by any corporation damaged for public use, any person interested may have such damages ascertained. The proceedings for ascertaining and paying such damages shall be the same as are or may be provided by law for assessing damages, which owners of land may sustain in consequence of its appropriation for railroad purposes.

United States requires that private property shall not be taken for public use without just compensation. The power of eminent domain is inherently in the government, without any constitutional, statutory or legislative provision. The fifth amendment is merely a limitation or restriction upon the sovereign power of eminent domain. It provides simply that the sovereign in exercising the power must make just compensation to the party injured by such exercise.

A preliminary inquiry, therefore, is first as to the meaning in general of the term "just compensation" and second the scope, force and effect of such term as used in the 5th amendment.

In 20 Corpus Juris 641 and 642 is found the following definition:

> "The term 'compensation' . . . means a full indemnity or remuneration for the loss sustained by the owner of property taken or injured, and such constitutional requirement is not satisfied by a mere colorable compliance. 'Compensation' and 'damages' are practically equivalent terms." (Citing Bauman vs. Ross, 167 U. S. 548.)

"Just compensation should be determined on equitable principles and should be such as to put the owner in as good condition pecuniarily as he would have been if the property had not been taken." See 20 Corpus Juris 642 (citing U. S. vs. Rogers, 257 Federal 397; U. S. vs. Nahant, 153 Federal 520.)

As to the force, effect and scope of the constitutional provision for just compensation, the

courts have apparently uniformly adhered to the view that it guarantees to the owner of property that in the event he is deprived of his property by the sovereign, he will be paid the damages accruing to him on account of such deprivation.

For example in the case, in re Rugheimer, 36 Federal 369, the court said:

> "In this act (referring to the act authorizing condemnation), Congress has empowered certain public officials who may thereto be specially authorized to put in operation the right of eminent domain. It requires this right to be exercised by judicial proceedings in the district or circuit courts of the United States. These courts in directing and conducting these proceedings, mindful of the constitutional obligations must see to it that the process of condemnation be not awarded unless full compensation is provided."

Again in the same case it was said:

> "The act of 1888 must be read in *pari materia* with the constitution. The term 'condemnation' used in that act, must be construed to mean condemnation with just compensation. The machinery of the courts is employed to ascertain and secure such compensation."

The view which the courts have taken on the matter is well stated in Nichols on Eminent Domain, volume one, section 204, where the author says:

> "There has been much discussion of the question whether the obligation to

> make compensation is an essential part of the power of eminent domain, so that the taking of property for public use without compensation is not an exercise of eminent domain at all, or whether the obligation to make compensation is a condition imposed on the exercise of its power in all well ordered communities. The latter is now accepted as the sounder view." (Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 685); (Weeks vs. Kress 194 Mass. 296-298; 80 N. E. 220).

And also the following quotation from section 208, volume one, Nichols on Eminent Domain, shows the modern trend of authority:

> "That just compensation to which an owner is entitled when his property is taken by eminent domain is regarded by law from the point of view of the owner and not of the condemning party. In other words, just compensation in the constitutional sense is what the owner has lost and not what the condemning party has gained." (Boston Chamber of Commerce vs. Boston 217 U. S. 189; U. S. vs. Chandler Dunbar Water Power Co. 229 U. S. 53.)

For authorities to the same effect see:

U. S. vs. Rauers, 70 Federal 748, *in re* Manderson, 51 Federal 501.

III.

IN CONDEMNATION PROCEEDINGS COMPENSATION IS DUE UPON THE DATE OF THE TAKING.

The question of whether or not defendants in

error in this case are justly and legally entitled to damages by way of interest upon the awards, will depend upon when the compensation awarded by the commissioners and the jury was due and payable.

The plaintiff pleaded apparently, the commissioners, the jury and the court found, and the parties stipulating as to the facts in this case, agreed that the lands in question were taken by the United States on April 19, 1912. On that date the defendant in error was entitled as a matter of strict constitutional right to the payment of the value of his lands so taken, for, as previously pointed out, the 5th amendment requiring just compensation where land is taken under the power of eminent domain, is a restriction and a limitation of the right of eminent domain, or, conversely, when the right of eminent domain is exercised, the right of compensation automatically follows:

A leading authority on this proposition is the case of Parks vs. Boston (Mass. 16 Pick 198) from which counsel quote the following excerpt found in section 436 in Nichols on Eminent Domain:

> "The true rule would be, as in the case of other purchases, that the price is due and ought to be paid at the moment the purchase is made, when credit is not specially agreed on. And if a pie-powder court should be called on the instant and on the spot the true rule of justice for the public would be, to pay the compensation with one hand whilst they applied the axe with the other; and this rule is departed from only because

> some time is necessary by the forms of law to conduct the inquiry; and this delay must be compensated by interest. But in other respects the damages must be appraised upon the same rule as they would have been upon the day of the taking."

IV.

AS A GENERAL RULE INTEREST IS ALLOWED FROM THE TIME COMPENSATION IS DUE AND AS ALMOST A UNIVERSAL RULE FROM THE TIME OF ACTUAL POSSESSION BY THE CONDEMNOR.

After an extended search of the decisions, both state and federal in the United States, upon the proposition of damages by way of interest on awards in condemnation proceedings, we believe that few cases if any can be found in which interest has been denied the claimant from the time actual possession has been invaded. It is the disposition of the courts justly and fairly to offset or pay the damages accruing to the party by reason of the time intervening between the date of the taking and the date of the payment, by the payment of damages in the way of interest. This has been found to be not only just and right, but the most convenient method of disposing of the question of just compensation where an adjudication is not had until after actual taking. These questions have come up in a good many cases where private corporations, usually railroad companies in emergency cases and otherwise, have taken possession of property and condemnation proceedings have been brought

afterwards at varying lengths of time. A private corporation taking possession of property in advance of condemnation proceedings, or without any such proceedings is regarded as a trespasser, but the United States Government is not a trespasser.

(*a*) Where property is taken in time of great emergency, for instance for war purposes, and

(*b*) Where there is congressional authority to take the property and a fund provided for the payment thereof.

This latter condition exists in this case. The authorities hold generally that the Government has a right to seize property where the necessities of the case, in the judgment of the executive department demand it, and in cases where Congress has authorized the taking and provided a fund for compensation, and the court's sanction the taking because the Government and the states are always considered responsible for their obligations, hence the compensation can be fixed at a later date:

> "Cooley's Constitutional Limitations, (7th Edition) 813;
> U. S. vs. O'Neil, 198 Federal 677;
> U. S. vs. National Bank, 250 Federal 299;
> Great Falls Mnfg. Co. vs. Garland, 25 Federal 521.

It would seem, therefore, that if there is any case in which the justice of a requirement that interest should be paid in cases of prior taking, it would be in cases in which the State or the Government is condemnor. A drastic rule might

be reserved to be applied against private corporations violating the law in such cases, but when the right of the Government is recognized to seize properties without any judicial proceedings whatever, it is essential that if the Government, through its officers, has determined that immediote possession of the property of interest to all of the people is necessary, the owners should be compensated for moneys withheld until the compensation can be ascertained. In order that the court might see how this question of interest is regarded from a standpoint of absolute justice in the various states of the Union, we call attention to a few of many cases holding the claimant entitled to interest:

In the case of Syracuse L. S. & N. R. Co. v. State, 161 N. Y. S. 477, it is said:

> "As hereinbefore stated, the assumed appropriation of all the parcels was made at the same time at which time the sub-station and transmission line were in station and transmission line were in full operation, or as the saying is, were going concerns. The claimant acquiesced in the attempted appropriation by the state, waiving all irregularities, dismantled its transmission line and yielded possession of its strip of land and rights of way to the state to be converted into a spoil bank. For the state to take advantage of its own mistake and succeed in compelling claimant to accept an award based upon the value of its property in January, 1912, would be gross injustice to the claimant. We think the claimant is entitled to the award of $559.43 with interest thereon from June 1, 1908."

In re Southern New England Ry. Co. (R. I.) 94 Atl. 738, the court said:

> "Under the Constitution private property can not be taken in the exercise of the right of eminent domain without just compensation. If the circumstances of the matter had permitted, the damages should have been paid at the time the claimant's property was taken from him. The ascertainment of the amount of his damages necessitated delay. When the amount of his damages are determined, in justice they must be regarded as due to him of the day when his property was taken, and he is entitled to interest for their detention from that time until the time of payment. That is the principle generally recognized by the authorities dealing with this question of interest."

The court held in Hayes v. Ry. Co. 64 La. 756:

> "Where the landowner is kept out of both the use of the money and the use of the land, he is entitled to what would be equivalent to 6 per cent interest upon the money . . . The assessment is to be reached through a computation. But from what date? The date of the commissioner's appraisement is not material. That appraisement, as we have seen, did not of itself give a right to interest, or anything equivalent thereto. The date, manifestly, from which computation is to be made, is the time of taking possession."

In Moll v. Sanitary District, 228 Ill. 635, the court said:

> "The plaintiff was deprived of his property without any compensation for the use thereof, from the time the defendant took possession until the final award fixing his damages. He could not accept the $6,000 deposited without waiving his appeal. If his appeal had been unsuccessful he would not have been entitled to interest, for he ought to have accepted the amount awarded. But the judgment in his favor on the appeal is conclusive of his right to reject the tender, and it is clear that he was entitled to interest upon the full value of the property taken by the defendant from the time the latter took possession."

In Alloway v. Nashville, 88 Tenn. 510, 8 L. R. A. 123, it is said:

> "Nevertheless, we have no hesitation, in holding upon general principles, that interest should have been allowed from the time of the appropriation of the property. From that time the original owner was deprived of the use and possession of the land taken. The liability of the city accrued to that date, though the amount thereof is not determined finally until long thereafter."

Upon this proposition the Massachusetts courts are frequently quoted because Massachusetts has frequently dealt with the question of interest in eminent domain proceedings. In the case of Old Colony R. R. v. Miller, 125 Mass. 3, the court said:

> "The right of the landowner to damages for land taken by a railroad corpora-

> tion is complete when the location is made. That act constitutes the taking. It is the law of the case by the exercise of the right of eminent domain at that time, for which the statute provides indemnity. The amount is then due, and if agreed upon between the parties must be then paid. If not agreed on, damages are assessed by a jury on the application of either party; but they are assessed as of the time of the location, and the jury may properly allow interest upon the amount ascertained as damages for the detention of the money from the time of the taking."

See following cases to the same effect:

> Chandler vs. Jamaica Pond Aqueduct Co. 125 Mass. 544;
> Phillips vs. South Park Commissioners, 119 Ill. 626, 10 N. E. 230.

The text writers have stated this proposition, regardless of statute, definitely and positively. Nichols on Eminent Domain, Sec. 216, we quote as follows:

> "The law is that when land is taken by eminent domain, or when it is injured in such a way as to create a constitutional right to damages, payment for the land thus affected should be coincident with the taking or injury, and if for any reason payment is postponed, the right to interest from the time that payment ought to have been made until it is actually made follows as a matter of strict constitutional right. . . When, however, the owner is not paid the compensation until after the taking or injury

> is complete, as is the practice in many states, either with or without sanction of law when land is taken, and in almost all of them when it is merely damaged, it is well settled that he is entitled to interest, or at least to its equivalent in the form of damages for the detention of his money."

Quoting further from this authority, we call the attention of the Court to the following, on page 653, Vol. 1, of said work:

> "There is one limit upon the function of the legislature to fix *punctum tempora* in the case of interest, it can not be later than the time of actual dispossession."

In other words, we take it that according to this authority, it is not within the power of the legislature to provide for depriving a party of the actual possession of his lands and deny him interest from the time of dispossession.

In the case of People ex rel Central Trust Co. v. Stillings, 121 N. Y. S. 13, it was said:

> "The theory of the law of condemnation is that payment for the land taken shall be coincident with the taking, and if for any reason payment is postponed, the right to interest from the time payment ought to have been made follows as a matter of strict constitutional right."

In the case of Reed v. Chicago, etc., Ry. Co., 25 Fed. 886, we have no less authority upon the question of interest than Mr. Justice Shiras, at that time Judge of the Circuit Court for the Northern District of Iowa. He states:

> "In cases wherein the company enters upon possession before the trial of the cause upon appeal, and the damages are increased, then the property owner is entitled to interest from the time of the possession taken until payment is made. . . . Under the facts of this case, the plaintiff is entitled to interest on the amount of the damages as ascertained by the verdict of the jury from the time the defendant took possession of the right-of-way over the plaintiff's lands up to the time the defendant pays the damages awarded plaintiff."

The United States contends in brief, that the statute of New Mexico as construed in the case of A. T. & S. F. Ry Co. vs. Richter, 20 New Mex. 278, 140 Pacific, 478, prescribed in effect that awards in condemnation cases shall bear interest at 6 per cent from the date of taking is a statute prescribing a rule of substantive law and hence is not binding upon the United States. We ask this Court to follow the New Mexico statute in this case, not because necessarily it can be regarded upon the question of interest as practical pleading forms and modes of procedure as set forth in the act of Congress of August 1, 1888 (25 statutes 357), but because it is a just and fair statute as interpreted by the Supreme Court of the State and as applied to the facts in this case and because it is in line with the decisions of nearly all of the states in the Union. To be sure, the United States courts are not compelled to follow the statutes of the various states, nor to be at the mercy of state legislatures, but as stated by Mr. Justice Adams in the case of the United States vs. Sargent, 162 Federal, 81:

> "When these statutes and decisions are just and right and are applicable, they will be adopted."

This same idea was adopted substantially by the Circuit Court of Appeals in the case at bar.

There is no general condemnation statute in the United States but the rule has been apparently to direct in the statutes authorizing condemnation by the Government, that 'the proceedings shall be carried on in conformity to the state statutes. The constitutionality of this form of United States Statute was first called into question in the case of Jones vs. United States, 48 Wisconsin, 385, which was later affirmed by the United States Supreme Court in 109 U. S. 513.

An act of Congress, March 3, 1875, provided that "whenever, in the prosecution and maintenance of the improvement mentioned, it should become necessary or proper, in the judgment of the secretary of war, to take possession of any lands, or the right of way over any lands, for canals or cut-offs, or to use any earth, quarries, or other material adjacent to the line of improvement and needful for its prosecution or maintenance, the officers in charge of the works might, in the name of the United States, take possession of and use the same after having first paid, or secured to be paid, the value thereof, 'which may have been ascertained in the mode provided by the laws of the State' wherein the property lay."

In affirming this case the United States Supreme Court through Mr. Justice Field said among other things:

"The use of the courts of the state in applying the rules of naturalization prescribed by Congress, the exercise at one time by state justices of the peace of the power of committing magistrates for violations of federal law, and the use of state penitentiaries for the confinement of convicts under such laws, are instances of the employment of state tribunals and state institutions in the execution of powers of the General Government. At different times, various duties have been imposed by Acts of Congress on state tribunals; they have been invested with jurisdiction in civil suits and over complaints and prosecutions for fines, penalties and forfeitures arising under laws of the United States. (1 Kent 400.) And though the jurisdiction thus conferred could not be enforced against the consent of the States; yet, when its exercise was not incompatible with state duties, and the states made no objection to it, the decisions rendered by the state tribunals were upheld. Whatever question might arise as to such delegation of authority, we can see none where the inquiry relates to an incidental fact, not involving in its ascertainment the exercise of any sovereign attribute. Almost, if not quite from the first year of its existence, it has been the practice of the General Government when necessary to take private property for public uses, to resort to state boards and tribunals to ascertain the value of the property and hence the compensation to be made. (*Burt vs. Ins. Co.*, 106 *Mass.* 262.) In recent statutes such resort is expressly prescribed. For example, on the 3rd of March, 1879, an act was passed for improving a part of the Tennessee River, which provided that, whenever it became necessary to take private prop-

> erty, 'The price to be paid shall be determined and the title and jurisdiction procured in the manner prescribed by the laws of the State of Alabama.' And on the 14th of June, 1880, an Act was passed making an appropriation for constructing reservoirs on the head waters of the Mississippi, with a provision that 'Injuries occasioned to individuals by the overflow of their lands shall be ascertained and determined by agreement, or in accordance with the laws of Minnesota.' These are but examples of many instances of legislation where resort is had to local boards or tribunals to ascertain particular facts by which the General Government may be guided in its action. Whatever assent may be necessary to the validity of the proceedings against the United States, owing to their general immunity from process, is given by such legislation."

The apparent holding of this court in the case of United States vs. Jones is simply that by the passage of a statute prescribing the use of the state courts or laws for the purpose of ascertaining the just compensation guaranteed by the Constitution, the United States waives the immunity that it would otherwise have from being subjected either to the state courts or the state laws. Followed to its logical conclusion, therefore, the principle would seem to be that where this immunity is waived, the provision of the state law to the effect that the damages for the time intervening between an actual taking and a payment therefor should be measured by interest on the value of the land at the time of taking, is in effect consented to or adopted by the United

States as a proper and convenient method for the computation of such damage.

V.

IN CONDEMNATION PROCEEDINGS THE UNITED STATES MAY BE REQUIRED AS A PART OF THE JUST COMPENSATION UNDER THE CONSTITUTION TO PAY DAMAGES IN THE NATURE OF INTEREST.

There is no reason in law or absolute justice why any different rule should be applied relative to the payment of interest from the date of taking possession in the case when the United States takes the land than is applied in the case when a private corporation takes it. Considerable comment is made in the brief of the plaintiff in error on the case of United States v. Sargeant, 162 Fed. 81. A number of cases cited and relied upon in the brief of the plaintiff in error are disposed of by the court in the Sargeant case. We think the Court, in that case has laid down the principle, well supported by precedent in the federal courts, as we shall hereafter show, that the United States may be required in condemnation proceedings to pay interest, and that the courts are not precluded by the Statute, 177 Judicial code, which forbids the allowance of interest on claims against the United States, upon the ground, as stated by the court, that

> "There is a great difference between the prosecution of a claim or account against the United States by a person who pushes it and a proceeding of this kind instituted by the United States.

> This proceeding, instead of one to collect an account or claim against the United States, is a civil action, instituted by the United States against the owners of lands to take it from them. The land owners are not plaintiffs prosecuting a claim, but defendants resisting a proceeding to deprive them of what is theirs until a condition precedent is fulfilled."

The court does not hold, as seems to be considered by plaintiff in error, in its brief, that this court is bound upon the question of interest by the statutes of the various states, but it does hold that whenever it appears that interest is fairly and justly due and the payment thereof is supported by the laws of the state in which the question arises, this court will apply the rule and require the United States to pay interest.

> "The cases make a clear distinction in the application of the rule as between an action founded in tort and a claim for damages for land taken under the power of eminent domain. When the land is taken, the owner is deprived of the use of his property and should be compensated at once for the injury done. If payment be delayed, he has the prima facie right to claim damages for the delay." (Hoffman v. Philadelphia, 25 Pa. 1; also Water Commrs, 195 N. Y. 502).

The case of Monongahela Navigation Company v. U. S. cited in the Sargeant case, appears to counsel to announce the basic principle which underlies the right to interest in condemnation proceedings as against the U. S. or a private corporation. This case is referred to and quoted from

in Lewis on Eminent Domain (3rd Edition) Sec. 683, where the author says:

> "In the ascertainment of the just compensation to be made for property taken, the parties are entitled to an impartial tribunal and to an opportunity to appear and be heard before such tribunal. It follows, therefore, that the legislature can not fix the compensation, or determine in what it shall consist, or prescribe the rules or principles upon which it shall be computed. An act of Congress authorized the condemnation of a lock and dam belonging to the Monongahela Navigation Company and provided 'that in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated.' In a proceeding under this act this proviso was disregarded and compensation was given for the franchise. The court says: 'By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial inquiry and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.'"

The Circuit Court in the case of U. S. v. Sargeant, in citing the case of Monongahela Nav. Co. v. U. S. supra, said:

> "Without holding that the requirement for the payment of interest is one of the 'modes of procedure' which by Section 2, Act of August 1, 1888, is made compulsory upon the courts of the United States, we are satisfied to conform to it as the only palpably fair and reasonable method of performing the indispensable condition to the fair right of eminent domain, viz: of making just compensation for the lands, as ascertained, at the time of taking. 'The time of taking' under the Minnesota statute, supra, is when payment is made for it. 'Just compensation' as of that time, must be made. Monongahela River Co. v. U. S. 148, U. S. 324, 341, 13 Supreme Court, 622, 27 Law. Ed. 463. It is better when possible, to act in harmony rather than in conflict with the established policy of the state."

Counsel indicate that the Sargeant case is to be distinguished from the case at bar in that, as one of the reasons, the court was willing to follow the Minnesota statute in order that "just compensation may be made to the condemnee." *A consideration of the case at bar, and a consideration of the Sargeant case* will, in our opinion, show that the case at bar has infinitely stronger claim for interest than was apparent in the Sargeant case. It does not appear in the Sargeant case that the United States had taken possession and had enjoyed the fruits, the rents and profits of the land, but the court considered the statute

of Minnesota requiring the payment of interest from the time the award was found by the commissioners, as just and fair, because the owners would not be responsible for delays ensuing in the payment of the compensation. Infinitely more just and fair is the case of these claimants in the case at bar, who have been deprived of the possession of their property, out of which the Government has been making profit during the time it seeks to escape the payment of interest, and since the decision of the case of A. T. & S. F. R. R. Co. v. Richter, above quoted from, by the Supreme Court of the State of New Mexico, the rule in New Mexico is just as strong as the statute of Minnesota, requiring payment of interest from the time of possession.

As stated above, we consider the most important holding in the Sargeant case to be that a condemnation proceeding is not a claim against the United States within the statute prohibiting the payment of interest on claims, and that, therefore, the courts are free to consider the justice, in all condemnation proceedings, of demands for interest.

The point is made that the United States are not required in condemnation proceedings to follow any statute, but might follow the common law rule, in which no interest would be allowed. This is the argument made by Judge Phillips in a dissenting opinion in the Sargeant case, and we take it that it needs no answer from us in view of the fact that the remaining two justices of the court, to-wit: Messrs. Sanborn and Adams, did not consider those reasons controlling.

We wish to submit that in nearly every in-

stance in which interest has been disallowed in condemnation proceedings against the United States that it is because the United States had not taken actual possession of the property, and we submit that in each and every case where interest has been disallowed, as we will hereafter show, if it had been shown that the Government had taken actual possession of the lands the ruling would have been different.

Take the case of *In re Post Office Site,* 210 *Fed.* 832, referred to on page 11 of the brief of the plaintiff in error. The court states its reason for disallowing interest as follows:

> "The owners have had the use of the property until the present time, and they are not entitled to the use of the land and interest also."

This is the case to which counsel refers when he remarks that it was decided after the decision in the Sargeant case. It has nothing whatever to do with the principle laid down in the Sargeant case. The decision does not deny but what interest may be allowed against the Government in a proper case. It states:

> "Assuming that these are final judgments, interest will not run against the United States."

In the case at bar we are not seeking to obtain interest upon final judgments, but to obtain interest on money due and withheld prior to judgment. That court, in the Post Office Site case, states further:

> "We know of no authority for the award of costs."

We wish to respectfully submit that the United States Supreme Court, in the very recent case of United States v. Cress heretofore cited in this brief, decision by Mr. Justice Pitney, 61 Law Ed. 746, succeeded in finding a rule to require the United States in condemnation proceeding to pay costs. See also U. S. v. Engeman 46 Fed. 898.

Take, for further illustration, the dissenting opinion of Judge Phillips in the Sargeant case:

> "The kernel of the ruling of the Supreme Court (referring to Shoemaker v. U. S. 147 U. S. 284) is that the reason for disallowing any interest anterior to the judgment of condemnation is that the 'amount was not fixed or ascertained until a confirmation of the report' and *that the retention of the possession of the property by the condemnee is equivalent to the interest.* (Italics our.) . . . Until the judgment of condemnation the Government is not required to pay anything, as the obligation to pay and the right to take and enter upon the property and the right of the property owner to demand payment are corelative and contemporaneous. Until that time the *possession* of the invaded property remains with the owner, and in condemnation or general common law, until judgment of condemnation there can be no default on the part of the Government as the basis for imposing interest."

In the Shoemaker case, the reason for disallowing interest is distinctly stated and differ-

entiates that case very sharply from the case at bar. The following is quoted from the opinion:

> "The fourteenth assignment charges the court with error in refusing to allow interest on the amounts assessed as the valuation for the lands selected for the Rock Creek Park. The argument shows that the interest claimed was for the time that elapsed between the initial proceedings and the payment of the money into court. The vice of this contention is in the assumption that the lands were actually withdrawn from the *possession* of their owners by the mere filing of the map."

In the case of Bauman v. Ross, referred to on page 11 of the brief of the plaintiff in error, it was sought to obtain compensation as for a taking against the United States simply because under a statute providing for condemning certain lands for a highway in the District of Columbia, a map or plat of the lands contemplated to be condemned had been filed of record, and of course the court held that this was not such a taking of possession as would entitle the claimants to interest from that date. The court said:

> "Under the constitution and by the express provision of Sec. 18 of this Act, the United States are not entitled to possession of the land until the damages have been assessed and actually paid. The payment of damages to the owner of the land and the vesting of the title in the United States are to be contemporaneous. The constitution does not require damages to be actually paid at any ear-

lier time, nor is the owner of the land entitled to interest pending proceedings."

No such equities appeared in behalf of the claimant in that case as appeared in the case at bar. The case of Carlyle vs. Cooper, cited by counsel, does not touch this case. It was a case in which the court refused to hold the Government for costs which would not necessarily be a part of the just compensation. In the Highbridge Lumber Company case, the court refused to hold the Government for damages adjacent to this town, stating that it was prosecuted in Kentucky, and there being no statute for condemnation proceedings, it was under the common law. In the case of Nahant vs. U. S., the court observed that no interest was allowable because it did not appear but what the town had not been disturbed in its possession during all of the proceedings. It is a very different case from the one here, and it has the exact distinction which we claim, to-wit: that the Government has been at all times in possession of our property and we are asking interest only from the time that possession was invaded.

In the case of the U. S. vs. O'Neal, the court held that the question of necessity for the taking was not regulated by state law, which, of course, is true, because the necessity for the taking is a matter resting with the Government only, and is not a part of the procedure to ascertain compensation.

The case of Kanakanui vs. U. S. throws no light upon this case. That is where the court refused to apply the provisions of an extraordinary

statute of Hawaii to the effect that if the petitioner dismissed his condemnation proceeding and abandoned his efforts at condemnation he should be liable for damages and costs to the condemnee.

To the same effect is the case of

Town of Hingham v. U. S. 161 *Fed.* 295. The opinion is by Mr. Justice Putnam. The court said:

> "As to the question of interest, we refer again to Parks v. Boston, which leads up to the other propositions which we need to consider, in that, at page 206 et seq., the opinion insists on, and reiterates and illustrates, the rule that the value of the land taken is to be estimated as of the time of taking. Such being the fact, it would seem to follow that the obligation to make compensation for the land arises prima facie as of the time of taking, so that, therefore, according to the ordinary rules, it would carry interest from that time. It is true that, under the provisions of many constitutions and also in accordance with the terms of the pleadings and judgment of condemnation in this case, title is not wholly divested out of the owner until payment is made; but, on fundamental principles, when the title does completely vest, it is as of the time when the taking occurred. In other words, the well-known rule thus explained in Parks v. Boston usually, in Massachusetts, determines the point as of which all the rights of the parties are ultimately fixed. There may be exceptional cases, as was pointed out by us in United States v. Nahant, 153 Fed. 520. . . . In United States v. Nahant, already re-

ferred to, we refused to apply so technical a rule, in view of the fact that the town remained in full enjoyment of the use of what was there taken by condemnation. . . . What is more peremptory are Edmands v. Boston, 108 Mass. 535, 551, and Norcross v. City of Cambridge, 166 Mass. 508, 44 N. E. 615, 33 L. R. A. 843, to the effect that, where a statute provides that damages shall not be paid until the land has been entered upon, and possession taken, without any provision for compensation for delay in payment, the ordinary rule as to interest does not apply, and interest is not payable until the money becomes due, and that the Constitution of Massachusetts permits this, unless the owner proves that he has been put to trouble or expense, or incurred loss of the use of his land, not considered in assessing the damages. There is no evidence here of anything of that nature; and therefore, for aught we can see, we must hold that the rulings of the District Court were correct."

The principle under discussion, that is, the allowance of interest against the United States in condemnation proceedings from the time of the taking of actual possession of the lands, was recently applied by Judge Clayton in the United States District Court of Alabama, in the case of

United States v. First National Bank, et al, 250 *Fed.* 299 (*Advance Sheet* 2. *Aug.* 29, 1918).

In this case the Government had taken possession of the property of the claimants for a training camp and had afterwards brought con-

statute of Hawaii to the effect that if the petitioner dismissed his condemnation proceeding and abandoned his efforts at condemnation he should be liable for damages and costs to the condemnee.

To the same effect is the case of

Town of Hingham v. U. S. 161 *Fed.* 295. The opinion is by Mr. Justice Putnam. The court said:

> "As to the question of interest, we refer again to Parks v. Boston, which leads up to the other propositions which we need to consider, in that, at page 206 et seq., the opinion insists on, and reiterates and illustrates, the rule that the value of the land taken is to be estimated as of the time of taking. Such being the fact, it would seem to follow that the obligation to make compensation for the land arises prima facie as of the time of taking, so that, therefore, according to the ordinary rules, it would carry interest from that time. It is true that, under the provisions of many constitutions and also in accordance with the terms of the pleadings and judgment of condemnation in this case, title is not wholly divested out of the owner until payment is made; but, on fundamental principles, when the title does completely vest, it is as of the time when the taking occurred. In other words, the well-known rule thus explained in Parks v. Boston usually, in Massachusetts, determines the point as of which all the rights of the parties are ultimately fixed. There may be exceptional cases, as was pointed out by us in United States v. Nahant, 153 Fed. 520. . . . In United States v. Nahant, already re-

> ferred to, we refused to apply so technical a rule, in view of the fact that the town remained in full enjoyment of the use of what was there taken by condemnation. . . . What is more peremptory are Edmands v. Boston, 108 Mass. 535, 551, and Norcross v. City of Cambridge, 166 Mass. 508, 44 N. E. 615, 33 L. R. A. 843, to the effect that, where a statute provides that damages shall not be paid until the land has been entered upon, and possession taken, without any provision for compensation for delay in payment, the ordinary rule as to interest does not apply, and interest is not payable until the money becomes due, and that the Constitution of Massachusetts permits this, unless the owner proves that he has been put to trouble or expense, or incurred loss of the use of his land, not considered in assessing the damages. There is no evidence here of anything of that nature; and therefore, for aught we can see, we must hold that the rulings of the District Court were correct."

The principle under discussion, that is, the allowance of interest against the United States in condemnation proceedings from the time of the taking of actual possession of the lands, was recently applied by Judge Clayton in the United States District Court of Alabama, in the case of

> *United States v. First National Bank, et al*, 250 *Fed.* 299 (*Advance Sheet 2, Aug.* 29, 1918).

In this case the Government had taken possession of the property of the claimants for a training camp and had afterwards brought con-

demnation proceedings under the Alabama statutes. The Alabama statute does not provide for the payment of interest as applied in that case, but the authority is found in a decision of the Supreme Court of that State, just as the authority here is found in a decision of the Supreme Court of our State in Railway Co. v. Richter, above referred to. The state case is that of Jones v. Ry. Co., 70 Ala. 233, which is a well considered case and was evidently relied on by Judge Clayton in his instructions to the jury. The legal rate of interest in Alabama is eight per cent, and the court instructed the jury as follows:

> "The sole question for you to determine in each one of the cases is the value of the lands and the property at the time of the actual taking and occupation by the United States, together with interest at the rate of eight per cent per annum, the legal rate allowed on said sums so ascertained by you from the date of such actual taking and occupation."

The statute under which this proceeding was had was a war measure, but it contains the same language as the statute we now have under consideration, to-wit: August 1, 1888. The language in the statute of July 2, 1917, under which the Alabama decision was had, relative to such proceedings in the state in which the action is instituted, is as follows:

> "Such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property in the states wherein the proceedings may be instituted."

We wish to submit that we see no difference, in substance, in a provision that "the practice, pleadings, forms and modes of procedure" must conform to the state laws and in a provision that such proceedings must be "prosecuted" in accordance with such laws.

The latest case having a direct bearing on the question here at issue is that of U. S. vs. North American Transportation Co. decided by this court June 1, 1920, and referred to at pages 13 and 22 in the brief for the United States. That case involved a suit brought by the transportation company against the United States in the court of claims to recover the value of a mining claim taken and occupied by the Government. The transportation company claimed interest on the amount of their claim for the time intervening between the date of occupancy by the United States and the date of the entry of judgment. This court held that the plaintiff in that case could not recover interest in the face of section 177 of the Judicial Code which provides directly that no interest should be allowed on claims up to the time of the rendition of judgment by the court of claims. In support of their position the Transportation Company cited the case of the United States vs. Sargeant, the opinion of the Circuit Court of Appeals in the case at bar, and others heretofore referred to in this brief. This court however, distinguished their case, pointing out,

(a) That in each of the cases cited, the Federal statute had provided that the condemnation should be conducted in accordance with the laws of the state in which the land was situated, and under

the law of each state, interest was recoverable;

(b) That the conformity provisions could have no application to lands in Alaska, and

(c) That the conformity provisions could not affect proceedings brought in the court of claims.

This court apparently approved the theory upon which the Sargeant case and the case at bar were decided in the circuit court of appeals, saying:

> "The company argues that interest is allowed in condemnation proceedings, not qua interest for default or delay in paying the value, but as the measure of compensation for the use and occupation during the period which precedes the passing of the title. (See Klages v. Terminal Co. 160 Pa. 386, 28 Atl. 862), and that collection of an amount, measured by interest, is not prohibited either by the statute limiting the powers of the Court of Claims or by the common law rule which exempts the sovereign from liability to pay interest (United States v. New York, 160 U. S. 598, 16 Sup. Ct. 402, 40 L. Ed. 551). This may be the theory on which interest should be allowed in compensation proceedings; and it may be that, even in the absence of the conformity provision referred to above, interest could be collected as a part of the just compensation in condemnation proceedings brought by the government. For as suggested in United States v. Sargeant, *supra*, such a proceeding is not a suit by the land owner to collect a claim against the United States, but an adversary proceeding in which the owner is the defendant and which the Government institutes an order to secure title to land. (Mason City & Ft. Dodge R.

R. Co. v. Boynton, 204 U. S. 570, 27 Sup. Ct. 321; 51 L. Ed. 629). On the other hand this suit brought in the court of claims is a very different proceeding."

VI.

RENTS AND PROFITS NOT REGARDED AS PROPER MEASURE OF DAMAGES FOR DELAY IN PAYMENT OF JUST COMPENSATION.

Counsel for plaintiff in error has contended at length that the measure of damages for the delay in the payment of the just compensation which is established as of the date of the taking, should be measured by the rents and profits or the actual value of the use of the land, and the evidence should have been submitted and the findings returned by the Commissioners or the jury as to the value of such use. However, no case is cited by counsel to sustain such contention, and we state that after diligent effort upon our part none can be found. By reference to the authorities cited in subdivision IV it will be found that the almost universal rule in all of the states, as well as the rule heretobefore applied in the federal courts, has been to measure this compensation for delay by legal interest, and as a matter of law, when interest is recoverable the same may be added to the verdict as a matter of calculation by the court and included in the judgment. This is the rule established in *Reed v. Chicago, etc., R. Co.*, 25 Federal 886, and the cases are collected in a note to the case of *St. Louis, etc., R. Co. vs. Oliver*, 10 Annotated Cases 748.

The only case we have found in which rents and profits or the value of the actual use of lands has been considered in condemnation proceedings is where the condemnor wishes to offset such use as the condemnee might have had of his lands after the supposed taking against the interest allowable by the general rule.

Lewis on Eminent Domain, Vo. 2, 3rd Edition, Section 705, and cases cited under notes 92.
Sutherland on Damages, 4th Edition, Vol. 1, Section 336.

It is submitted that no such rule could obtain here because it appears from the very allegations of the Government's petition in condemnation that the taking was completed on the 19th day of April, 1912; that the Government "flooded and thereby appropriated" the said lands. Therefore there was no "use" after said period in the said lands to the owner, and if there had been under the rule laid in *Sutherland on Damages*, above cited, the burden is upon the condemnor to show such value.

Furthermore, such rule can not be applied in this case because the theory of the petition, and in fact the theory upon which the case was tried in the lower court, was and is that the Government to all intents and purposes became the absolute owner of the lands on April 19, 1912, and nothing remained thereafter but to obtain the naked legal title upon the payment of the compensation, and any rents and profits accruing after that date would not belong to the owner.

The rule heretofore adopted by the Circuit

Court of Appeals in the Sargeant case and in the instant cases upon the whole is not only just but uniform and certain. The rule contended for by counsel would result in great uncertainty and speculation. In no case would the Government authorities know what compensation they might be required to pay in case the necessities of government required an appropriation in advance of condemnation proceedings. Rental value, to be sure, might be more or less certain, but where there is no rental value it would become a contest between the Government and the owner as to what uses the land would or could have been put to, and the value of such uses. In considering the just compensation to which an owner is entitled, and in establishing the value of the land at a different time for such purpose, the productive value of the land or the value to its owner based on the income as able to be derived from his use of the land is not the measure of compensation and not material, except so far as it throws light upon the market value.

10 *Ruling Case Law, Sec.* 112, *and cases cited under Note* 4.

Respectfully submitted,

W. C. Reid

J. M. Herron

Howard Bowser

Attorneys for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

No. 147.—October Term, 1920.

The United States of America, Plaintiff in Error, *vs.* William E. Rogers et al.	In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 28, 1921.]

Mr. Justice Day delivered the opinion of the Court.

The United States brought an action January 18, 1915, in the District Court of the United States for New Mexico, to condemn lands of the defendants in error for reclamation purposes. 32 Stat. 388. Condemnation proceedings to acquire real estate for Government uses and public purposes under judicial process are regulated by the Act of August 1, 1888. 25 Stat. 357.

Section 2 of the Act provides that the practice, pleadings, forms and modes of proceedings in causes, arising under the provisions of the act, shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record in the State within which such circuit or district courts are held.

The petition averred the necessity of appropriating the lands in question; that the Secretary of the Interior had determined to acquire the defendants' real estate; that at the date of the completion of the work lands of the defendants were flooded, and thereby appropriated by the United States under the authority of the acts of Congress; that the owners received no compensation; that necessary funds were available to pay any damages which might be awarded defendants. The petition prayed that the court appoint Commissioners to assess the damage which the owners had sustained in consequence of the taking and appropriation of their lands, and that upon payment of the amount assessed the lands

be decreed to be the property of the United States from the date of the appropriation thereof.

The award of the Commissioners was filed February 3, 1917, and an order was entered July 27, 1917, directing that the sums awarded be deposited, and distributed for the benefit of the owners. Subsequently the owners made a motion for a supplemental order requiring the United States to deposit sums equal to 6% interest on the awards calculated from April 19, 1912, the time when the lands were taken by flooding the same. The court made an order requiring the deposit of the additional sum, to which order the United States excepted, and prosecuted a writ of error from the Circuit Court of Appeals of the Eighth Circuit, where the judgment of the District Court was affirmed. 257 Fed. 397.

It appears that the allowance of interest was from the time of the actual taking of the land to the time deposit was made in payment for the same.

The questions upon which the case was taken to the Circuit Court of Appeals appear from the assignments of error, and are: (1) That the District Court erred in awarding interest against the United States from April 12, 1912, to date of deposit of the awards in court, for the reason that interest cannot properly be allowed in a condemnation case against the United States for any period prior to date of final judgment; (2) that the District Court erred in awarding interest against the United States from April 19, 1912, to date of deposit of awards in court, for the reason that interest cannot properly be allowed in a condemnation case against the United States for any period prior to date of the order of the court placing the United States in possession of the lands condemned; (3) that the District Court erred in awarding interest at the rate of six percentum per annum against the United States from April 19, 1912, to date of deposit of awards in court, for the reason that there is no authority of law for allowing interest at said rate on judgments against the United States.

As we are reviewing the judgment of the Circuit Court of Appeals, the assignments of error in that court are the ones open here, and it is evident from what we have said that the question in substance come to this: Was there error in awarding the owners

interest on the value of their lands appropriated from the time of actual taking of the same until compensation was made?

It is unquestionably true that the United States upon claims made against it, cannot in the absence of a statute to that end, be subjected to the payment of interest. *Angarica* v. *Bayard*, 127 U. S. 251, 260; *United States* v. *North Carolina*, 136 U. S. 211, 216, cited and approved in *National Volunteer Home* v. *Parrish*, 229 U. S. 494, 496. In the present case the landowners did not sue upon a claim against the Government, as was the fact in *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330. The Government was seeking for purposes authorized by statute to appropriate the lands, and it had actually taken them, and had deprived the owners of all beneficial use thereof from the date from which the allowance of interest ran.

Having taken the lands of the defendants in error, it was the duty of the Government to make just compensation as of the time when the owners were deprived of their property. *Monongahela Water Co.* v. *United States*, 148 U. S. 312, 341.

In fixing the compensation the District Court, and the Circuit Court of Appeals in affirming the judgment, followed the New Mexico statute fixing the rate of interest at 6%. This was in conformity with a former ruling of the Circuit Court of Appeals applying the Statutes of Minnesota to lands appropriated in that State. *United States* v. *Sargent*, 162 Fed. 81.

The Government urges that the Conformity Act of August 1, 1888, does not require the United States Government to be bound by the rule of the state statute in the allowance of interest. This may be true, but we agree with the courts below that the allowance of just compensation by giving interest from the time of taking until payment is a convenient and fair method of ascertaining the sum to which the owner of the land is entitled. The fact that the rule is in harmony with the policy of the State where the lands are situated does not militate against but makes for the justice and propriety of its adoption. *United States* v. *Sargent*, *supra*.

We find no error in the judgment of the Circuit Court of Appeals, and the same is

Affirmed.